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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 295.

THE CITY OF DETROIT, PLAINTIFF IN ERROR,

vs.

ELIZABETH S. OSBORNE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED FEBRUARY 19, 1887.

Accession 23935

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 2, 1889.

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1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Elizabeth S. Osborne, plaintiff, and The City of Detroit, defendant, a manifest error hath happened, to the great damage of the said defendant, The City of Detroit, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the first day of December, in the year of our Lord one thousand eight hundred and eighty six.

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States
for the Eastern District of Michigan.

Allowed as to defendant.
H. B. BROWN,
U. S. District Judge.

[Endorsed:] 7104. In the Supreme Court of the United States. The City of Detroit, p'ff in error, *vs.* Elizabeth S. Osborne, def't in error. Writ of error. Filed Dec. 1, 1886. Walter S. Harsha, clerk. Henry M. Duffield, att'y for p'ff in error.

2 The United States of America to Elizabeth S. Osborne, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein The City of Detroit is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan, this first day of December, A. D. 1886.

HENRY B. BROWN,
District Judge.

STATE & EASTERN DISTRICT OF MICHIGAN, } ss:
County of Wayne, }

John B. Whelan, being duly sworn, says that on the second day of December, A. D. 1886, he served a true copy of the foregoing citation upon Moore & Canfield, attorneys for the above plaintiff, by leaving the same with Henry Mandell, a clerk, being in charge of their office, between the hours of 3 & 4 o'clock p. m. of said day.

JOHN B. WHELAN.

Subscribed & sworn to before me this 2nd day of December, 1886.

WALTER S. HARSHA,
Notary Public, Wayne Co., Mich.

[Endorsed:] In the Supreme Court of the United States. The City of Detroit, pl'ff in error, *vs.* Elizabeth S. Osborne, def't in error. Citation. Filed Dec. 2, 1886. Walter S. Harsha, clerk. Henry M. Duffield, att'y for pl'ff in error.

3 *Bond on Writ of Error.*

Know all men by these presents that we, The City of Detroit, as principal, and Henry M. Duffield and William B. Moran, of said city of Detroit, as sureties, are held and firmly bound unto Elizabeth S. Osborne in the sum of fifteen thousand dollars ($15,000.00), lawful money of the United States of America, to be paid to the said Elizabeth S. Osborne, or to her certain attorney, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and each and every of them, firmly by these presents.

Sealed with our seals. Dated the 2nd day of December, one thousand eight hundred and eighty-six.

The condition of this obligation is such that whereas the said Elizabeth S. Osborne lately, in the circuit court of the United States for the eastern district of Michigan, recovered against the above-bounden City of Detroit a judgment in an action of trespass on the case in the amount of ten thousand dollars damages, besides costs of suit;

And whereas the said above-bounden City of Detroit has sued out a writ of error to the Supreme Court of the United States to review the said judgment:

Now, therefore, if the said City of Detroit shall well and truly prosecute its said writ to effect, and if it fails to make its plea good

shall answer all damages and costs, then this obligation to be void; otherwise to be and remain in full force and effect.

WM. B. MORAN. [SEAL.]
HENRY M. DUFFIELD. [SEAL.]

In presence of—
JOHN B. WHELAN.

THE CITY OF DETROIT,
By WILLIAM B. MORAN, *Controller.*

[Seal of the City of Detroit.]

Attest: WM. T. DUST, *City Clerk.*

I approve of the foregoing bond as to the sufficiency of sureties and amount of penalty.

H. B. BROWN,
U. S. District Judge.

Endorsed: 7104. U. S. circ't court, E. dist. Mich. Osborne *vs.* Detroit. Bond on writ of error, $15,000.00. Filed Dec. 2, 1886. Walter S. Harsha, clerk.

4 *Declaration.*

Circuit Court of the United States for the Eastern District of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Elizabeth S. Osborne, who is a citizen of the State of Ohio, by Moore & Canfield, her attorneys, complains of the City of Detroit, a municipal corporation existing under the laws of the State of Michigan and a citizen of the State of Michigan, which — deponent [defendant] herein, in a plea of trespass upon the case, filing this declaration as commencement of suit, for that—

Whereas the said defendant is a municipal corporation under the laws of the State of Michigan, under a charter granted by the Legislature of the State of Michigan, under which charter said defendant, through its common council, is authorized to grade, pave, repair, and otherwise improve the highways, streets, avenues, lanes, alleys, or interior public places created by the intersection of the streets, cross-walks, and sidewalks in said city, and also to construct and repair all sidewalks in said city.

And the plaintiff avers that under its charter it is the duty of said defendant to keep and maintain its streets and sidewalks in good and safe repair, so that all persons may pass and repass safely over the same.

But that the said defendant, in disregard of its duty in this respect, negligently and wrongfully, on the 19th day of November, 1883, and for a long time prior thereto, allowed the sidewalk on the north side of Church street and adjoining the police station, in said city, to become defective, decayed, and out of repair, and to be and remain in a dangerous and unsafe condition; that defendant had full notice of the unsafe condition of said walk, but negligently and

wrongfully neglected to repair the same; that said Church street is one of the streets of said city, and that on the said 19th day of November, 1883, the said plaintiff, while lawfully passing along said sidewalk in a prudent and careful manner, and without any notice of the dangerous and defective condition of the sidewalk and without any fault or neglect on her part, was by reason of such dangerous and defective condition of said sidewalk tripped and was thrown down and caused to fall, and was thereby greatly bruised and injured and thereby became lame, blind, sick, and disordered, and has so remained from thence hitherto; during all which time the plaintiff underwent great bodily pain and was prevented from attending to her usual business, and was forced to lay out great sums of money for medical attendance, amounting in all to $1,000, in endeavoring to cure her of her injuries, and also suffered other personal injuries, all to the plaintiff's damage of $20,000, and therefore she brings suit.

MOORE & CANFIELD,
Pl'ff's Att'ys.

5 We acknowledge ourselves security for all costs which may be adjudged against the plaintiff by the said court in the above cause.

MOORE & CANFIELD.

Endorsed: 7104. Circuit court of U. S., east. dist. of Mich. Elizabeth S. Osborne, compl't, *vs.* The City of Detroit, def't. Declaration. Filed Sept. 13, 1884. Walter S. Harsha, clerk.

6 *Rule to Plead.*

In the Circuit Court of the United States for the Eastern District of Michigan. No. 7104.

SEPT. 13, 1884.

On filing a declaration in this cause as commencement of suit and on motion of Moore & Canfield, attorneys for the plaintiff, it is ordered that the said defendant be, and it is hereby, required to appear and plead, answer, or demur to said declaration within twenty days after service upon it of a copy thereof and notice of the entry of this rule or judgment, etc.

WALTER S. HARSHA, *Clerk.*

7 *Proof of Service of Declaration.*

In the Circuit Court of the U. S., East. Dist. of Michigan.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

STATE OF MICHIGAN, *County of Wayne,* } *ss:*

Henry A. Mandell, being duly sworn, deposes and says that on the

13th day of September, 1884, he served a true copy of the declaration on file in this cause, with rule to plead within twenty days after service, etc., duly endorsed thereon, on the defendant herein by delivering the same to and leaving it with L. S. Trowbridge, Esq., controller, for said city, at his residence, in said city of Detroit.

HENRY A. MANDELL.

Subscribed and sworn to before me this 20th day of October, 1884.

FREMONT WOODRUFF,
Notary Public, Wayne Co., Mich.

Endorsed: No. 7104. Circuit court of the United States for east. dist. of Mich. Elizabeth S. Osborne *vs.* City of Detroit. Proof of service of *narr.*, etc. Filed October 2nd, 1884. Jno. Graves, dep'y cl'k.

8 *Plea in Abatement.*

In the Circuit Court of the United States for the Eastern District of Michigan.

THE CITY OF DETROIT
ads.
ELIZABETH S. OSBORNE.

The said City of Detroit, defendant in this suit, by Henry M. Duffield, its attorney, comes and defends the wrong and injury, when, etc., and says that the said plaintiff ought not to have or maintain her aforesaid action against it, the said City of Detroit, in the said circuit court of the United States for the eastern district of Michigan, because it says that the said Elizabeth S. Osborne is not a citizen of the State of Ohio, but is a citizen of the State of Michigan and the United States of America, and that it, the said City of Detroit, is also a citizen of the State of Michigan and of the United States of America; and this it is ready to verify.

Wherefore it prays judgment if the said plaintiff ought to be answered to her said declaration in this the said circuit court of the United States for the eastern district of Michigan.

HENRY M. DUFFIELD,
Attorney for Defendant.

9 STATE OF MICHIGAN,
Eastern District of Michigan, County of Wayne, } *ss:*

Henry M. Duffield, being duly sworn, deposes and says that he is city counselor of the city of Detroit and its attorney in this cause; that the above plea is true in substance and in matter of fact, as he is informed and verily believes to be true.

HENRY M. DUFFIELD.

Subscribed and sworn to before me this 29th day of September, A. D. 1884.

JNO. B. MOLONY,
Notary Public, Wayne County, Mich

Endorsed: 7104. In the circuit court of the United States, eastern district of Michigan. The City of Detroit *ads.* Elizabeth S. Osborne. Plea in abatement. Filed Sept. 30, 1884. Walter S. Harsha, clerk.

10 *Motion to Strike Plea in Abatement from Files.*

Circuit Court of the United States for the Eastern District of Michigan.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

And now comes the plaintiff in the above-entitled cause, by Moore & Canfield, her attorneys, and moves the court that the plea in abatement filed in said cause be stricken from the files, and for such further order as the plaintiff may be entitled to in respect to said plea, for the reason that said plea was not filed within the time prescribed by the rules and practice of this court for the filing of pleas in abatement, and for the further reason that said plea was filed contrary to the rules and practice of this court.

MOORE & CANFIELD,
Plaintiff's Attorneys.

Oct. 1, 1884.

11 *Order Denying Motion to Strike — Plea in Abatement.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the sixth day of October, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause a motion by plaintiff to strike from the files the plea in abatement filed by the defendant is argued by counsel for respective parties and denied.

12 *Replication to Plea in Abatement.*

Circuit Court of the United States for the Eastern District of Michigan.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

And the said plaintiff saith that the said declaration filed in said

cause, by reason of anything by the said defendant in its plea in said cause in that behalf alleged, ought not to be quashed, because she says that at the time of the filing the said declaration against the said defendant she, the said plaintiff, was not a citizen of the State of Michigan, as the said defendant hath in its said plea in that behalf alleged, but that she then was and now is a citizen of the State of Ohio; and this she, the said plaintiff, prays may be inquired of by the country, &c.

MOORE & CANFIELD,
Pl't's Att'ys.

Endorsed: 7104. Circuit court of U. S., east. dist. of Mich. Elizabeth S. Osborne *vs.* The City of Detroit. Replication. Filed Oct. 6, 1884. Walter S. Harsha, clerk.

13 *Continuance.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Thursday, the twenty-sixth day of March, in the year one thousand eight hundred and eighty-five.

Present: The Honorable John Baxter, circuit judge, and the Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

By Judge Brown.

In this cause, on motion of Mr. F. H. Canfield, of counsel for the plaintiff, it is ordered that said cause be, and the same is hereby, continued for trial until next term, on payment by plaintiff of defendant's costs of subpœnaing witnesses for this term.

14 *First Trial. Plea in Abatement.*

At a session of the circuit court of the United States for the eastern district of Michigan, begun and held, pursuant to law, at the district court room, in the city of Detroit, on Tuesday, the second day of June, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause the defendant's plea to the jurisdiction coming on for trial, thereupon comes a jury, namely, M. S. Osgood, Nelson Ewell, John R. Chandler, Gottschalk Grelling, Elijah Bartlett, Samuel Barbour, John C. Graves, William J. Daly, Frederick A.

Kaiser, John M. Norton, George Reeves, and Nelson Miller, good and lawful men, who, being duly impaneled, tried, and sworn well and truly to try the issue between the parties, sit together, and, after hearing the evidence in the case, the arguments of counsel, and the charge of the court, retire, under the charge of an officer of the court duly sworn for that purpose, to consider of their verdict to be given, and, after being absent for a time, return into court and say upon their oath that they are unable to agree upon a verdict, and are thereupon discharged by the court from the further consideration of the case.

15 *Second Trial. Plea in Abatement.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Friday, the thirteenth day of November, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

The parties in this cause being — court, by their respective attorneys, and the defendant's plea in abatement coming on for trial, thereupon comes a jury, namely, Edward Vandemark, William Q. Minckley, Albert D. Pierce, Hiram B. Chittenden, Henry Knowles, Joseph M. Barnard, Charles H. Moore, Henry Richards, Frank Roberson, J. B. Stone, Oscar F. Brinton, and George English, good and lawful men, who, being duly empaneled, tried, and sworn well and truly to try the issue between the parties, sit together, and, after hearing the evidence in the case, the arguments of counsel, and the charge of the court, retire, under the charge of an officer of the court duly sworn for that purpose, to consider of their verdict to be given, and, after being absent for a time, return into court and say upon their oath that the said plaintiff, Elizabeth S. Osborne, is a citizen of the State of Ohio, in manner and form as alleged in the plaintiff's declaration in this cause.

16 *Judgment Respondeat Ouster.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the fourteenth day of November, in the year one thousand eight hundred and eighty-five.

Present: The Honorable B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

The jury by whom the defendant's plea in abatement was tried hav-

ing by their verdict found that the plaintiff is a citizen of the State of Ohio, as alleged in their declaration, now, on motion of Mr. F. H. Canfield, of counsel for the said plaintiff, it is by the court now here considered that the said defendant do answer over the declaration of the said plaintiff within twenty days from this date upon payment of a docket fee of $20.00.

17 *Demurrer.*

Circuit Court of the United States for the Eastern District of Michigan.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

The said defendant says that the said declaration is not sufficient in law.

HENRY M. DUFFIELD,
Attorney for Defendant.

Endorsed: 7104. U. S. circuit court for eastern dist. of Mich. Elizabeth S. Osborne *vs.* City of Detroit. Demurrer. Filed Nov. 25th, 1885. Jno. Graves, dep'y cl'k.

18 *Amended Declaration.*

Circuit Court of the United States for the Eastern District of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Elizabeth S. Osborne, who is a citizen of the State of Ohio, by Moore & Canfield, her attorneys, complains of the City of Detroit, a municipal corporation existing under the laws of the State of Michigan and a citizen of the State of Michigan, defendant herein, in a plea of trespass upon the case, filing this declaration as commencement of suit, for that—

Whereas the said defendant is a municipal corporation under the laws of the State of Michigan, having a charter granted by the Legislature of the State of Michigan, under which charter said defendant, through its common council, is authorized to grade, pave, repair, and otherwise improve the highways, streets, avenues, lanes, alleys, or interior public places created by the intersection of the streets, cross-walks, and sidewalks in said city, and also to construct and repair all sidewalks in said city.

And the plaintiff avers that under its charter it is the duty of said defendant to keep and maintain its streets and sidewalks in good and safe repair, so that all persons may pass and repass safely over the same.

But that the said defendant, in disregard of its duty in this respect, negligently and wrongfully, on the 19th day of November,

1883, and for a long time prior thereto, allowed the sidewalk on the north side of Church street and adjoining the police station, in said city, to become defective, decayed, and out of repair, and to be and remain in a dangerous and unsafe condition; that defendant had full notice of the unsafe condition of said walk, but negligently and wrongfully neglected to repair the same; that said Church street is one of the streets of said city, and that on the said 19th day of November, 1883, the said plaintiff, while lawfully passing along said sidewalk in a prudent and careful manner, and without any notice of the dangerous and defective condition of the said sidewalk, and without any fault or neglect on her part, was, by the reason of such dangerous and defective condition of said sidewalk, tripped and was thrown down and caused to fall, and was thereby greatly bruised and injured, and thereby became lame, blind, sick, and disordered, and has so remained from thence hitherto; during all which time the plaintiff underwent great bodily pain and was prevented from attending to her usual business and was forced to lay out great sums of money for medical attendance, amounting in all to $1,000, in endeavoring to cure her of her injuries, all of [to] the plaintiff's damage of $20,000.

For that whereas, also, the said defendant is a municipal corporation under the laws of the State of Michigan, having a charter granted by the Legislature of said State, under which charter said defendant, through its common council, is authorized to grade, pave, repair, or otherwise improve the highways, streets, avenues, lanes, or interior public places created by the intersection of the streets, cross-walks, and sidewalks in said city.

19 And whereas, at the time of the injury hereinafter set forth and for a long time prior thereto, it was the duty of the said defendant to keep and maintain its streets and sidewalks in good and safe repair, so that all persons may pass and repass safely over the same.

And whereas a certain other street, to wit, Church street, in said city, is one of the public streets of said city, and the sidewalk along the north side of said street is a sidewalk which it is and at the time of the happening of the injury herein complained of and prior thereto it was the duty of said defendant to maintain and repair as aforesaid.

And the plaintiff avers that on the 19th day of November, 1883, and for a long time prior thereto, said sidewalk on the north side of Church street and between Michigan avenue and Trumbull avenue became and was defective and decayed, and certain planks thereof and timbers thereof became worn, decayed, loose, and so insecurely fastened, and said sidewalk was in other respects so defective, decayed, and out of repair as to endanger persons passing over and along said sidewalk; that the said defendant, prior to said 19th day of November, had notice of the defective and dangerous condition of said sidewalk, and the said defendant had a reasonable opportunity, after said sidewalk became unsafe and out of repair as aforesaid and before the happening of the injury herein complained of, to put the same in proper repair, and that it was the duty of said

defendant, prior to the day aforesaid, to repair said sidewalk and cause the same to be put in good repair and so maintained; yet the said defendant, in disregard of its duty in the premises, wrongfully neglected to repair said sidewalk, and wrongfully and negligently permitted said sidewalk to be and remain out of repair and in the defective, unsafe, and dangerous condition aforesaid, to wit, from the 1st day of October, 1883, up to and including said 19th day of November, 1883, and that on said 19th day of November the plaintiff, while lawfully passing along said sidewalk in a prudent and careful manner and without notice on her part of the dangerous and defective condition of said sidewalk and without any fault or neglect on her part, was by reason and in consequence of the dangerous and defective condition of said sidewalk as aforesaid, and by reason of the planks thereof being decayed, loose, worn, and insecurely nailed and fastened, tripped and thrown and caused to fall and was thereby greatly bruised and injured, and thereby became lame, blind, and sick and disordered, and has so remained from thence hitherto; during all which time plaintiff underwent great bodily pain and was prevented from attending to her usual duties as a housekeeper, and was forced to lay out large sums of money for medical attendance, amounting in all to one thousand dollars, in endeavoring to cure her of said injuries, sickness, wounds, and disorders, and hath been otherwise damnified, to wit, at Detroit, in the district aforesaid, to the damage of the plaintiff of twenty thousand dollars.

For that whereas, also, heretofore, to wit, at the time of the injury hereinafter set forth, to wit, on the 19th day of November, 1883, and for more than ten years prior thereto, in the city of Detroit, in said district, the said defendant has kept and maintained a common and public street or highway known as Church street, a portion of which street lies between Michigan avenue and Trumbell avenue, which are also public streets, in said city, and along the northerly side of Church street and between said avenues has kept and maintained a sidewalk for the use of travelers on foot, to wit, at Detroit, in said district.

And whereas said Church street and said sidewalk thereon, at the time of the injury hereinafter set forth and for more than ten years prior thereto, were open to public travel and for all persons to travel over and along, and were within the jurisdiction and under the power and control of The City of Detroit, the defendant herein, to wit, at Detroit, in said district; and whereas it was the duty of said defendant to keep said Church street and said sidewalk thereon situated in good repair, so that — should be safe and convenient for all persons at all times to travel over and along and to pass and repass thereon, to wit, in Detroit, in said district, but the plaintiff avers that said plaintiff [defendant], in neglect of its said duty, carelessly, negligently, and wrongfully allowed and permitted said sidewalk to get and become wholly out of repair and good order, and permitted and allowed the planks and timbers thereof and of which said sidewalk was composed to become and to remain rotten, decayed, and defective, and to become loose and unfastened and displaced, so that said side-

walk became and was, at the time of the injury hereinafter described and a long time prior thereto, out of repair and wholly unsafe and unfit for travel or for people to pass over on foot or otherwise, of all which the said defendant had full notice, and said defendant had a reasonable time and opportunity after said sidewalk became out of repair and unsafe and unfit for travel as aforesaid to put the same in proper condition for use and in proper and safe repair, and said defendant knowingly, carelessly, negligently, and wrongfully permitted and allowed said sidewalk to be and remain out of repair and good order for a long space of time, to wit, from the 15th day of October, 1883, until and after the time of the injury of said plaintiff hereinafter set forth, and said defendant did not use reasonable diligence in the premises, but carelessly, negligently, and knowingly neglected to put and keep said sidewalk in good order and repair, and in a reasonably safe and fit condition for travel and use for the public, as the said defendant was in law bound to do, and during the time when said sidewalk was so as aforesaid out of repair and good order, to wit, on the 19th day of November, 1883, at Detroit aforesaid, the plaintiff while passing along over said sidewalk in a prudent and careful manner, and without notice of the unsafe and dangerous condition of said sidewalk and without any fault or neglect on her part, by reason and in consequence of said sidewalk being out of repair and unfit and unsafe for travel as aforesaid, was tripped and caused to fall, and was then and there thrown to and upon said sidewalk with great force and violence and was severely hurt, bruised, and wrenched, and was otherwise severely wounded and lamed,

21 and by reason of said fall and the hurt and injuries so received as aforesaid said plaintiff then and there became and was sick, sore, weak, lame, and disordered and blind, and so remained and continued from thence hitherto, and the plaintiff has suffered and endured great pain and suffering, and was wholly disabled and incapacitated from attending to her business and duties as a housekeeper, and was forced to and did necessarily lay out and expend large sums of money for medicine, nursing, and medical attendance in endeavoring to cure her said hurts and injuries, to wit, the sum of one thousand dollars ($1,000), and she was otherwise greatly injured and damaged, to wit, at Detroit aforesaid, to the damage of the plaintiff of twenty thousand dollars.

That her claim for such damages and injuries was heretofore, to wit, on or about the 10th day of March, 1884, by her presented to the common council of said city for audit and allowance, and the same was by said council rejected, and therefore she brings suit.

MOORE & CANFIELD,
Att'ys for Plaintiff.

To H. M. Duffield, Esq., def't's att'y:

Take notice that the foregoing is a copy of the declaration filed in the within-mentioned cause as amended.

MOORE & CANFIELD.

Dated November 28, 1885.

Endorsed: No. 7104. U. S. circuit court, east. dist. of Mich. Elizabeth S. Osborne *vs.* City of Detroit. Amended *narr.* Filed Nov. 28, 1885. Walter S. Harsha, clerk.

22 *Demurrer to Amended Declaration.*

Circuit Court of the United States for the Eastern District of Michigan.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

The said defendant says that the said amended declaration is not sufficient in law.

HENRY M. DUFFIELD,
Attorney for Defendant.

Endorsed: 7104. U. S. circuit court, E. dist. of Michigan. Elizabeth S. Osborne *vs.* The City of Detroit. Demurrer. Filed Dec. 14, 1885. Walter S. Harsha, clerk.

23 *Joinder in Demurrer.*

Circuit Court of the United States for the Eastern District of Michigan.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

The plaintiff says that the amended declaration is sufficient in law.

Yours, &c., MOORE & CANFIELD,
Att'ys for Plaintiff.

To Henry M. Duffield, Esq., att'y for def't.

Endorsed: 7104. U. S. circuit court, east. dist. of Mich. Elizabeth S. Osborne *vs.* The City of Detroit. Joinder in demurrer. Filed Dec. 21, 1885. Walter S. Harsha, clerk.

24 *Demurrer Argued and Submitted.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the fourth day of January, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause a demurrer by defendant to plaintiff's amended declaration coming on for hearing is argued by counsel for respective parties and submitted.

Preliminary Objections to Demurrer Overruled.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the eleventh day of January, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause the objections by plaintiff to defendant's demurrer to declaration are hereby overruled, and it is ordered that said demurrer be argued at the present term.

25 *Demurrer Argued and Submitted.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the twenty-fifth day of January, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

This cause came on for hearing on the demurrer of the defendant to the plaintiff's declaration, and was argued by counsel for the respective parties and submitted to the court for decision thereon.

Demurrer Overruled.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the eighth day of February, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause a demurrer by defendant to plaintiff's declaration having been heretofore argued and submitted, after due deliberation thereon said demurrer is by the court now here overruled, with leave to defendant to answer over within five days.

26 *Plea.*

In the Circuit Court of the United States for the Eastern District of Michigan.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

And now comes the above-named defendant, by Henry M. Duffield, his attorney, and demands a trial of the matters set forth in the plaintiff's declaration.

HENRY M. DUFFIELD,
Attorney for Defendant.

Endorsed: 7104. U. S. circuit court, E. dist. of Michigan. Elizabeth S. Osborne *vs.* The City of Detroit. Plea. General issue. Filed February 11th, 1886. Jno. Graves, dep. clerk.

27 *Continuance.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the third day of March, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

On motion of F. H. Canfield, attorney for the plaintiff, this cause is hereby continued for trial until next term.

28 *3rd Trial Begins.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the fourteenth day of September, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

The parties in this cause being in court, by their respective attorneys, ready for trial, thereupon comes a jury, namely, William Armstrong, Miner T. Cole, James M. Hoyt, Jr., John Grimes, Philip De Barry, Lewis C. McBride, Ziba Graham, George P. Felcher, Charles P. P. Hutchinson, James O'Donnell, Thomas Delaney, and Patrick Hughes, good and lawful men, who are duly impaneled, tried, and sworn well and truly to try the issue between the parties, and sit together and hear a portion of the evidence in the case.

Verdict on Third Trial.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the fifteenth day of September, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together, and after hearing the conclusion of the evidence in the case, the arguments of counsel, and the charge of the court, retire, under the charge of an officer of the court duly sworn for that purpose, to consider of their verdict to be given, and, after being absent for a time, return into court and say upon their oath that the said defendant is guilty of the premises in the plaintiff's declaration in this cause laid to its charge, in manner and form as the said plaintiff hath therein alleged, and they assess the damages of the said plaintiff by reason thereof at the sum of ten thousand dollars.

29 *Time to Move for New Trial Extended.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Friday, the seventeenth day of September, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause, on motion of Mr. H. M. Duffield, attorney for the defendant, it is ordered that the time to move for a new trial be, and the same is hereby, extended ten days.

30 In the Circuit Court of the United States for the Eastern District of Michigan.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

Motion for a New Trial.

And now comes the said defendant, by Henry M. Duffield, its attorney, and moves the court to set aside the verdict heretofore rendered in this cause and any judgment entered thereon, and to grant a new trial thereof for the following, among other, reasons:

1. Because the court erred in admitting against the objection and exception of defendant the testimony of the witness Bateson in regard to the accident to himself and wife.

2. Because the court erred in permitting Dr. Gaylord, who had not been sworn, to exhibit the plaintiff to the jury and to apparently put a sharp instrument, which had not been submitted to the plaintiff's counsel or admitted in evidence in any way, in the face and head and limbs of the plaintiff.

3. Because the court erred in refusing the motion of the defendant's counsel to strike out from the testimony of Robert J. Moore the description of the sidewalk from the rear of the station towards the intersection or junction of Michigan avenue and Church street.

4. Because the court erred in admitting the testimony of the witness Austin as to the condition of the walk a week after the accident.

5. Because the court erred in admitting against the exception of the defendant the testimony of William Bendel on cross-examination as to the condition of the sidewalk in the rear of the station and between that point and Michigan avenue.

6. Because the court erred in admitting against the exception of the defendant the testimony of Robert Robertson on cross-examination as to the condition of the sidewalk in the rear of the station and between that point and Michigan avenue.

7. Because the court erred in refusing to charge as requested by the counsel for the defendant in his 1st request.

8. Because the court erred in refusing to charge as requested by the counsel for the defendant in his 2nd request.

9. Because the court erred in refusing to charge as requested by the counsel for the defendant in his 3rd request.

10. Because the court erred in refusing to charge as requested by the counsel for the defendant in his 4th request.

11. Because the court erred in refusing to charge as requested by the counsel for the defendant in his 5th request.

12. Because the court erred in refusing to charge as requested by the counsel for the defendant in his 6th request.

13. Because the court erred in refusing to charge as requested by the counsel for the defendant in his 7th request.

14. Because the court erred in charging the jury that they
31 were at liberty to consider the condition of the sidewalk elsewhere than at the place of the accident in determining the question of the liability of the city.

15. That the court erred in instructing the jury that they might consider the fact that the accident occurred in front of the police station and within sight of the officers whose duty it was to have charge of the station.

16. That the court erred in charging the jury that the burden of proof as to contributory negligence is upon the defendant.

17. That the court erred in instructing the jury upon the question of contributory negligence that the city might be chargeable with negligence in maintaining the sidewalk, and "the question of other parties not noticing it they might not know the defect, or if for any reason the vision of the party was obstructed or their attention was diverted to some other object of interest they might pass over such defective sidewalk without being guilty of what the law calls contributory negligence."

18. That the court erred in charging the jury that they might consider the fact that Mr. Bateson's stepping on the plank was what caused the accident.

19. That the court erred in instructing the jury that the plaintiff is not necessarily debarred from recovery for the whole extent of her injury by reason of her not sending for a physician on Saturday. "It is only in case you should find that she was negligent in not sending for a physician on Saturday that she would be debarred from recovery, and that if the injury was so trivial as not to call upon a reasonable person to call a physician immediately, why, then, the fact that the plaintiff did not call a physician at once would not bar or preclude her from receiving the whole damages for the whole injury which the accident may be shown to have resulted in."

20. Because the verdict of the jury was against the weight of evidence.

21. Because the verdict of the jury was against the charge of the court.

22. Because the damages awarded in favor of the plaintiff were excessively large.

This motion is based upon the pleadings, files, and proceedings in said cause.

HENRY M. DUFFIELD,
Attorney for Def't.

To Moore & Canfield, att'ys for pl'ff:

Please take notice that a motion of which the foregoing is a true copy will be made before said court on Monday, the 4th day of October, 1886, at the opening of court on said day or as soon thereafter as counsel can be heard.

HENRY M. DUFFIELD,
Att'y for Def't.

Endorsed: 7104. Circuit court of U. S. for east. dist. of Mich. Elizabeth S. Osborne *vs.* City of Detroit. Motion for new trial and notice. Filed Sept. 25, 1886. Walter S. Harsha, clerk.

32 *Motion for New Trial Argued in Part.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the ninth day of October, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause a motion by defendant for a new trial coming on for hearing is argued by counsel in part.

Motion for New Trial Submitted.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the eleventh day of October, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause the motion by defendant for a new trial is further argued by counsel and submitted.

33 *Time to Settle Bill of Exceptions Extended.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the nineteenth day of October, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

EZIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause, on motion of Mr. H. M. Duffield, attorney for defendant, it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended ten days.

34 *Opinion of Judge Brown.*

Circuit Court of the United States for the Eastern District of Michigan.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

OCT. 25, 1886.

On motion of defendant for a new trial.

The plaintiff in this case obtained a verdict for $10,000 for personal injuries received by her in falling upon a defective sidewalk upon the north side of Church St., in this city, between Michigan and Trumbull avenues. Defendant now moves for a new trial upon the following grounds:

1. The admission of the testimony of Bateson in regard to the accident to himself and wife and the precautions they took afterwards.

Bateson testified, in substance, to the defective condition of the walk at that place, and that about two months before the accident he and his wife met with a slight accident there, and that after that they always walked in single file. We take it that similar accidents occurring in the same neighborhood may be shown as evidence not only of the actual condition of the walk, but as tending to show notice to the city. It is true that the Massachusetts cases hold that this evidence is not admissible, upon the ground that it raises a collateral issue which the defendant is not called upon to try, and he therefore may well claim to be surprised. The weight of authority, however, is decidedly the other way. See Delphi *vs.* Lowry's Administrator, 74 Ind., 521, in which all the former cases are reviewed. So far as the Federal courts are concerned, the question has been put at rest by the case of the District of Columbia *vs.* Arms, 107 U. S., 519, which was also an action for damages received by a person from a fall caused by a defective sidewalk in the city of Washington. Upon the trial a policeman who saw the deceased fall on the sidewalk and went to his assistance, after testifying to the accident, was allowed to state that he had seen persons stumble over there and remembered sending home in a hack a man who had fallen there, and that he had seen as many as five persons fall there.

See also City of Chicago *vs.* Powers, 42 Ill., 169.
Pittsburg, etc., R. R. Co. *vs.* Rupy, 38 Ind., 294.
Quinlan *vs.* Utica, 74 New York, 603.
Dougan *vs.* Transportation Co., 56 New York, 7.
Kent *vs.* Town of Lincoln, 32 Vt., 591.
Darling *vs.* Westmoreland, 52 N. H., 101.
Moore *vs.* Burlington, 49 Iowa, 136.

35 2. That the court erred in permitting the exhibition of the plaintiff and her condition to the jury by Dr. Gaylord.

The doctor, who had not been sworn, exhibited the plaintiff to the jury and thrust a pin into the right side of her face, her right arm and leg, and from the witness' failing to wince the jury were asked to infer that there was a complete paralysis of her right side. Objection was made to this upon the ground that the doctor was not sworn as to the instrument he was using, nor was the plaintiff sworn to behave naturally while she was being experimented upon. It is argued that both the doctor and plaintiff might have wholly deceived the court and jury without laying themselves open to a charge of perjury, and that plaintiff was not even asked to swear whether the instrument hurt her when it was used on the left side, or did not hurt her when used on the right side; in short, there was no sworn testimony or evidence in the whole performance and no practical way of detecting any trickery which might have been practiced. We know, however, of no oath which could be administered to the doctor or the witness touching this exhibition. So far as we are aware, the law recognizes no oaths to be administered upon the witness stand except the ordinary oath to tell the truth or to interpret correctly from one language to another. The pin by which the experiment was performed was exhibited to the jury. There was nothing which tended to show trickery on the part of the doctor in failing to insert the pin as he was requested to do, nor was there any cross-examination attempted from the witness upon this point. Counsel were certainly at liberty to examine the pin and to ascertain whether in fact it was inserted in the flesh, and, having failed to exercise this privilege, it is now too late to raise the objection that the exhibition was incompetent.

It is certainly competent for the plaintiff to appear before the jury, and if she had lost an arm or a leg by reason of the accident they could hardly fail to notice it. By parity of reasoning it would seem that she was at liberty to exhibit her wounds if she chose to do so, as is frequently the case where an ankle has been sprained or broken, a wrist fractured, or any maiming has occurred. I know of no objection to her showing the extent of the paralysis which had supervened by reason of the accident, and evidence that her right side was insensible to pain certainly tended to show this paralysed condition. In criminal cases it has been doubted whether the defendant could be compelled to make profert of his person, and thus, as it were, make evidence against himself. The authorities upon this subject are collated in 15 Cent. Law Jour., p. 2, and are not unequally divided, but we know of no civil case where the injured person has not been permitted to exhibit his wounds to the jury. In Schroder *vs.* The C. R., I. & P. R. Co., 47 Iowa, 375, it was held not only that the plaintiff would be permitted in actions for personal injuries to exhibit his wounds or injuries to the jury, but that he might be required by the court, upon proper application therefor by the defendant, to submit his person to an examination for the purpose of ascertaining the extent of such injuries, and upon refusal might be treated as in contempt. See also 30th New York, 370.

But, even considering the testimony to have been improper, as there was not the slightest evidence offered by the defendant tending to show that the plaintiff was not completely paralysed, and, in fact, this was substantially admitted upon argument to the
36 jury, the defendant could not have been prejudiced by the testimony. We are not, therefore, entitled to infer that the sympathies of the jury were moved to a greater degree by this exhibition than by the uncontradicted testimony that the plaintiff had suffered a complete paralysis.

3. That the court improperly allowed the testimony of the witness Moore as to the condition of the sidewalk from the rear of the station to the intersection or junction of Michigan Ave. and Church St. The lot in front of which the accident occurred was a triangular piece of ground belonging to the defendant, the west 50 feet of which was occupied by a police station and the east 25 feet of which belonged to the same parcel of ground, but was not occupied. It was shown that the accident occurred about half the distance from the front to the rear of the building. The witness Moore was permitted to testify not only as to the condition of the walk immediately adjoining the station-house, but also to the fact that the easterly end of the walk in front of the vacant portion of the lot was in a very bad condition, and that as policeman he had reported to Sullivan, the inspector of streets, that it was out of repair. The evidence tended to show that while there were several planks loose immediately where the accident occurred, the easterly end of the walk, beginning about 25 feet from that spot and extending about 25 feet to Michigan Ave., was in a worse condition. The court was and still is of the opinion that plaintiff was not confined to proving the condition of the walk at the exact spot where the injury occurred. Bearing in mind that the duty of keeping this entire walk in repair was cast upon the city not only by virtue of its charter, but by virtue of its actual ownership of the lot in front of which the walk lay, we think that evidence of the bad condition of this walk anywhere from Michigan Ave. to Trumbull Ave. was competent. Of course there should be reasonable discretion exercised in admitting evidence of the condition of the walk near the accident, but, we think, in any case, if it be so near the place of accident that a person examining the walk or responsible for the condition of the walk in that neighborhood would be likely also to notice the defect at the spot where the accident occurred, it would be competent. In this case there can be little doubt that had the city performed its duty in repairing the easterly end of the walk its performance of such duty would have led to a knowledge of the defect which was the immediate cause of the accident.

Weisenberg *vs.* Appleton, 26 Wis., 56.
City of Ripon *vs.* Bittle, 30 Wis., 614.
Gude *vs.* Mancato, 30 Minn., 256.
Aurora *vs.* Hillman, 90 Ill., 61.
Boucher *vs.* New Haven, 40 Ct., 456.
Cusic *vs.* Norwich, 40 Ct., 376.

The case of Ring *vs.* Cohoes, 77 New York, 83, cited by the defendant, is not in point. In the case of McCool *vs.* Grand Rapids, 58 Mich., 41, which was an action for injuries received by a horse in stepping on a cobble-stone, of which there were several scattered about the streets, Mr. Justice Champlain, in delivering the opinion of the court, observed, *obiter*, that the proof showed that the horse was injured by stepping upon a single stone, and that the existence of other stones in the street had nothing to do with the injury. The remark was not necessary to the decision of the case, and the question as to the existence of other stones apparently did not arise. We do not understand the learned judge as having decided that the existence of other stones in the street might not have been evidence of notice to the city; but, in any event, the case is not entitled to great weight as authority, as the judges were equally divided in opinion.

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4. That the court erred in admitting the testimony of the witness Austin as to the condition of the walk after the accident. The witness first testified as to the physical condition and state of health of the plaintiff prior to and up to the time of the accident, and for the purpose of fixing the time when he heard of the accident he said he went with the plaintiff's husband to the spot where the accident occurred about a week afterwards, and that the walk had been repaired. We think that the testimony that the walk had been repaired was some evidence tending to show that the walk was out of repair at the time of the accident, and was in the nature of an admission which was competent to go to the jury; if not, the testimony was merely immaterial and worked no injury to the defendant.

5. That the court erred in refusing to charge that the act of 1885, having abrogated the common-law liability of the city, plaintiff could not recover, and also that under the act of 1885, if the plaintiff could recover at all, she could not recover to exceed the sum of $1,800.

The history of the law of Michigan upon the question of liability for injuries received upon defective sidewalks may not be out of place here. In the City of Detroit *vs.* Blakaby, 21 Mich., 84, it was held by a divided court that, in the absence of a statute to that effect, the cities of this State were not liable for damages received by defective sidewalks, and that remained the law of the State until 1879, when the first act was passed. The Federal courts, however, had felt themselves bound by precedents of the Supreme Court and had established a different rule, the consequence of which was that aliens and non-residents were permitted to recover for such injuries when citizens of this State could not do so. In 1879 an act was passed making all townships, villages, and cities liable to persons sustaining bodily injury upon any of the public highways or streets by reason of neglect to keep such highways and streets and all bridges, cross-walks, and culverts on the same in good repair. In the case of Detroit *vs.* Putnam, 45 Mich., 263, it was held that the act of 1879 did not allow damages for injuries sustained — reason of defective sidewalks. In 1885 an act was passed to amend the act

of 1879, in which the word "sidewalk" was inserted with the words "highway, street, bridge, cross-walk, and culvert," and new sections were introduced limiting the amount of recovery upon the basis of population and providing that "the common-law liability of townships, villages, and cities in this State for such injuries is hereby abrogated." This act was approved June 17, 1885, but did not take effect until August 17th. The accident in this case took place November, 1883. Suit was begun September, 1884, and in June, 1885, the case was first tried upon plea to the jurisdiction. We
38 think it clear that the act should be construed as prospective only in its operation. There were doubtless many other cases pending in the Federal courts and in the courts of the State at the time this act took effect, and if it were intended that the act should apply to these cases no doubt the Legislature would have so declared. Not only is there nothing in the act indicating that its operation was intended to be retroactive, but it was not even given immediate effect, as would almost certainly have been the case if it had been intended to operate upon actions already commenced or causes of action theretofore accrued. We understand the law to be well settled, as stated by Mr. Justice Cooley in his Constitutional Limitations, p. 370, that "it is a sound rule of construction to give a statute a prospective operation only unless its terms show a legislative intent that it should have a retrospective effect." See also Clark *vs.* Hall, 19 Mich., 369; Smith *vs.* Auditor General, 20th Mich., 398; Harrison *vs.* Metz, 17 Mich., 377.

Indeed, we consider it extremely doubtful whether, if the law were intended to be retroactive, it would not be in conflict with the constitution.

Kay *vs.* Penn. R. R. Co., 65 Pa., 269.
Wood on Retroactive Laws, sec. 172, and cases cited.
Bucher *vs.* Fitchburg R. R. Co., 131 Mass., 156.
Frasier *vs.* Tompkins, 30 Hun., 168.

6. That the court refused to give defendant's third request, under which it claimed immunity because the property in front of which the accident happened was in the custody and power of the police commissioners. The facts were that the entire lot and the station-house standing thereon belonged to the city, and was in charge of the police department. The witness Robinson testified that the vacant part of the lot was a sort of lawn, which the police also had the care of; that the sidewalks were put down by the city, and there was no evidence that the police department laid the walks or assumed the care of them. It is true the police commissioners are appointed by the Governor, and may perhaps be considered the officers or agents of the State rather than of the city, but the station-houses they occupy remain the property of the city, although within the custody and control of the police. Had this accident happened by the negligence of the police as custodians of such property it is entirely possible that this action would not have lain against the city, but Church St., upon which the accident occurred, is one of the public thoroughfares which it is the duty of the city to keep in re-

pair the same as all other streets, and this duty is not lessened by the fact that the lot in front of which this walk was laid was occupied by agents of the State, any more than it would have been if occupied by a private individual. The walk was originally laid at the expense of the city, and it was peculiarly incumbent upon the defendant to keep it in repair. By sec. 307 of the charter it is provided that the board of public works, a recognized agent of the city, shall supervise the grading, repairing, and improving of all streets within the city; and, by sec. 308, that they shall supervise the laying down of all sidewalks and cross-walks. No exception is made of streets upon which police stations are located or of the sidewalks opposite such station; nor is it anywhere provided that the
39 police commissioners shall either pave the streets, build sidewalks, or repair them in front of their stations.

We understand it to be the law that where authority is given to repair streets and sidewalks and means are furnished to make the repairs the corporation is charged with the duty, and upon it rests the liability for damages consequent upon this neglect of duty.

Cooley on Torts, 625.

In Barns *vs.* Dist. of Columbia, 91 U. S., 540, it was held that the District of Columbia, as a municipal corporation, was liable for injuries caused by the defective condition of its streets, although the streets were by act of Congress placed under the control of a board of public works appointed by the President and removable by him, the court saying that such a board was not an independent organization, but represented the municipality, although the municipality had no voice in the appointment of its members. This is a much stronger case against the defendant than the present one. See also Rehburg *vs.* The Mayor, 91 New York, 127.

7. That the court refused to charge that plaintiff was guilty of contributory negligence upon her own testimony and that of Bateson and Moore.

This testimony, putting it in its strongest light for the plaintiffs, shows that she walked along the street from Michigan Ave. without paying any attention to the walk; that it was notoriously rotten, so that any one could see the earth beneath the planks. The witness Moore states that the dangerous condition of the walk could be seen from Michigan Ave. without going onto Church St. The testimony, however, shows quite clearly that the worst part of the walk was at the easterly end, from 25 to 50 feet east of the spot from which the accident occurred. At this spot there seems to have been a hole in one side of the walk and several planks loose, so that the defect was visible to a person passing.

While this evidence undoubtedly tends to show contributory negligence, we do not think it so conclusive as to have justified the court in directing a verdict for the defendant. There are, undoubtedly, cases of this kind where this course may be properly taken, and in several actions of this description we have felt justified in directing a verdict for the defendant upon this ground, but the evidence ought to be so clear as to withdraw the question from the

region of reasonable doubt. For instance, if this accident had occurred to Bateson, who made use of this walk three or four times a day for months before, and to whom its condition was notoriously defective, so much so that he and his wife were accustomed to walk there in single file, we should have felt authorized to withdraw the case from the jury upon that ground; but the plaintiff here was not asquainted with the walk, was carrying a large market basket on her arm at the time, and had never had her attention directed to its condition.

It also appears to us very doubtful whether, admitting her guilt of negligence, such negligence could in any just sense be said to have proximately contributed to the accident. She had passed over the most dangerous portion of the walk and was tripped up, not by stepping upon a rotten plank herself, but by the act of Bateson in stepping upon one end and thus causing the other end to spring up directly in front of plaintiff. This was not her fault.

Even if she knew the sidewalk was unsafe this would not, in an ordinary case, be conclusive evidence of contributory negligence.

Wharton on Negligence, secs. 402 & 403.
Lyman *vs.* Hempshire, 140 Mass., 311.
Gilbert *vs.* Boston, 139 Mass., 313.
Whitaker *vs.* West Boylston, 97 Mass., 273.
Looned *vs.* McLean, 129 Mass., 33.
Weed *vs.* Ballston Sta., 76 New York, 329.
Dwier *vs.* Bailey, 139 Mass., 169.
Lowell *vs.* Watertown, 58 Mich., 563.

There is also a recent English case, the name of which has escaped me, in which it was held that a passenger upon a sidewalk was not ordinarily bound to look at the walk, but was entitled to presume that it was in good condition and repair.

8. That the court called the attention of the jury to the fact that the accident occurred in front of the police station and within sight of the officers whose duty it was to have charge of the station. This instruction was justified by the testimony of the witness Moore, himself a policeman, who swore that it was a part of his duty as policeman to take notice of these defects and report them to the board of public works or to another agent, whose duty it was to see the sidewalks were in a proper condition. This testimony was not only uncontradicted, but was not objected to, and we think it sufficient upon this point. While neither the city charter nor ordinances may have imposed this duty upon the police, if, in administration of the city government, it was the practice of the police to notify the board of public works of the existence of these defects, the court might properly call the attention of the jury to it. If there was any portion of the sidewalk which it was the peculiar duty of the city to keep in repair it was in front of their own property and within sight of the officers who made it a part of their daily duties to report these defects.

9. There was no error in submitting the question to the jury

whether the plaintiff had been guilty of contributory negligence in failing to send for a physician sooner, nor in the illustration which was put to the jury as pertinent to this question. The plaintiff was a mature but not an old woman, had always enjoyed excellent health, and the pain she suffered when she first returned home was not such as to excite any alarm. Had she been a physician herself, or a person of greater age or experience in these matters, the evidence of negligence would have been stronger, but it is very clear it should not have been taken from the jury.

10. There was no error in charging that the burden of proof of contributory negligence was upon the defendant. This was settled in The Railroad Co. *vs.* Gladmon, 15 Wall., 401; in Secord *vs.* St. Paul., etc., R. Co., 18 Fed. Rep., 221, and in Conroy *vs.* The Oregon Construction Co., 23 Fed. Rep., 71. There is nothing inconsistent with this case in Hayes *vs.* Mich. Cent. R. R. Co., 111 U. S., 228.

11. Considering the physical wreck of the plaintiff, the damages were not excessive, at least not so excessive as to justify the
41 court in setting aside the verdict upon that ground.

The motion for a new trial must be denied, and judgment will be entered upon the verdict.

42 *New Trial Denied and Judgment Entered.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the twenty-fifth day of October, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause the motion by defendant for a new trial heretofore argued and submitted, after mature deliberation thereon, is by the court now here denied.

And the jury by whom the issue in this cause was tried having rendered a verdict in favor of said plaintiff and against said defendant on the 15th day of September last for the sum of ten thousand dollars damages, now, on motion of Mr. F. H. Canfield, of counsel for the plaintiff, it is by the court now here considered that the said plaintiff do recover against the said defendant her damages aforesaid, together with interest thereon to this date, $77.78, making in all on this day ten thousand and seventy-seven dollars and seventy-eight cents, and also her costs and charges by her about her suit in this behalf expended, to be taxed, and that said plaintiff have execution therefor.

Time to Settle Bill of Exceptions Extended.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjourn-

ment, at the district court room, in the city of Detroit, on Tuesday, the twenty-sixth day of October, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause, on motion of Mr. H. M. Duffield, attorney for defendant, it is ordered that the time in which to settle a bill of exceptions be, and the same is hereby, extended ten days from the first day of the ensuing November term.

43 *Time to Settle Bill of Exceptions Extended.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the tenth day of November, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause, on motion of Mr. H. M. Duffield, attorney for defendant, it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended ten days.

Time to Settle a Bill of Exceptions Extended.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the twentieth day of November, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause, on motion of Mr. H. M. Duffield, attorney for defendant, the time to settle a bill of exceptions is hereby extended until Tuesday, 23rd inst.

44 *Time to Settle Bill of Exceptions Extended.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the twenty-fourth day of November, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause, on motion of Mr. H. M. Duffield, attorney for the defendant, it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended until Monday next.

Leave to Make Motion for New Trial Denied.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Friday, the twenty-sixth day of November, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

In this cause an application by defendant for leave to file a motion for a new trial is denied.

45 *Motion for New Trial.*

In the Circuit Court of the United States for the Eastern District of Michigan.

ELIZABETH S. OSBORNE, Plaintiff,
vs.
THE CITY OF DETROIT, Defendant.

And now comes the said defendant, by Henry M. Duffield, its attorney, and, under leave heretofore granted, moves the court to set aside the verdict of the jury heretofore rendered in this cause, and the judgment entered therein, and grant a new trial thereof for the following reason:

Because the damages awarded said plaintiff by said verdict are excessively large.

This motion is based upon the records and files in this cause and the affidavit of Henry M. Duffield, hereto attached.

HENRY M. DUFFIELD,
Attorney for Defendant.

Leave is hereby granted to enter and make the foregoing motion.
Detroit, Nov. 26th, 1886.

____ ____,
U. S. District Judge.

46 In the Circuit Court of the United States for the Eastern District of Michigan.

ELIZABETH S. OSBORNE, Plaintiff,
vs.
THE CITY OF DETROIT, Defendant.

STATE OF MICHIGAN,
Eastern District of Michigan, County of Wayne, } *ss:*

Henry M. Duffield, being duly sworn, deposes and says that George S. Osborne, the husband of the plaintiff in this cause, has presented his claim for damages for loss of services of the plaintiff in this cause, and expenses, medical bills, and nursing incurred by him by reason of the injury to the said plaintiff, and for which she recovered the verdict in this cause against the city of Detroit, through the board of aldermen thereof, and that the same was referred to the proper committee on claims and accounts, and before whom the testimony of the said George S. Osborne, a true copy whereof is hereto attached, was taken; that upon said testimony this deponent advised said committee to settle the claim of the said George S. Osborne for the sum of one thousand dollars ($1,000), and so recommended and advised said committee in the presence and hearing of said George S. Osborne, and that, as this deponent believes, the said committee were ready and willing to allow him the said one thousand dollars ($1,000), but that he refused the same and declined to settle for less than fourteen hundred dollars ($1,400), although stating that he would claim a very much larger sum in case such settlement was not made.

And further deponent saith not.

HENRY M. DUFFIELD.

Sworn to and subscribed before me this 24th day of November, A. D. 1886.

CYRUS E. LOTHROP,
Notary Public, Wayne County.

47 *Testimony taken before the Committee on Claims and Accounts.*

NOVEMBER 23RD, 1886—at 2 o'clock p. m.

Present: Aldermen Kronberg and Finney; counsel for plaintiff, Mr. Canfield; counsel for defendant, Mr. Duffield.

GEO. S. OSBORNE, Plaintiff,
vs.
THE CITY OF DETROIT, Defendant.

GEORGE S. OSBORNE, being duly sworn, testified as follows:

Examined by Mr. CANFIELD:

Q. You are the party who has presented this claim against the city, Mr. Osborne?

A. Yes, sir.

Q. You are the husband of Elizabeth S. Osborne?

A. Yes, sir.

Q. Now, do you remember the accident that she met with on Church St.?

A. Yes, sir.

Q. In 1883?

A. In November; I think the 17th, '83. Yes, sir.

Q. Prior to the accident what was the condition of her health—what was her physical condition?

A. I never had to call the doctor for the last seven or eight years.

Q. Prior to her accident she had been a healthy woman?

A. Yes, sir.

Q. How about her being able to attend to her household duties?

A. She done everything, sir.

Q. She took entire charge of her own work, did she?

A. Yes; everything.

Q. How about her doing outside work—outside of her own work?

A. Well, that was only for a little while—just to fill up a little spare time that she had.

Q. Since that accident what has been her condition as to being able to take care of herself or to attend to her household duties?

A. She has been utterly helpless; she has not been able to do anything. I had to help dress her, and had to cut her food.

Q. Was she able to feed herself—did you help her, I mean?

A. Yes, sir; all meats and hard substances I cut for her.

Q. How does she have to move about the house?

A. By dragging herself; by dragging her limb after her.

Q. Will you state to the committee if you know what the condition of her internal organs is?

A. She has diabetes trouble; she has to urinate every ten or fifteen minutes.

Q. During both day and night time?

A. Oh, day and night just the same. She may not be so
48 bad for a spell; for a week or two it will not be quite as bad, and then it will come on more frequently; any change in the weather affects her.

Q. What doctors attended her?

A. She was attended by Dr. Gilchrist and Dr. Gaylord while she was in Detroit.

Q. How much have you paid Dr. Gilchrist?

A. I paid him twenty dollars, and I paid him that receipt (looking at receipt) of seven dollars, and I paid him the five dollars for attendance on examining her in the court-room. That was his bill, as stated.

Mr. DUFFIELD:

Q. You mean paid your witness fees?

A. I just told you; that would be twelve dollars. There was another bill—eight or nine dollars—I am not sure of that.

Mr. CANFIELD:

Q. That is the only receipt you are able to find?

A. Yes, sir; I paid him that at the house where I lived, on 14th street.

Q. What attendance did Mrs. Osborne have by way of nurse?

A. Miss Graham took care of her from the time after the accident. She is home, and takes care of the place for us.

Q. Well, how?

A. She has had entire charge of Mrs. Osborne, because I could not be with her all day long. She has been with her ever since the time of the accident, in November, 1883, to the first of July, 1884. That is the time Doctor Gaylord took charge of her.

Q. How much did you pay Miss Graham?

A. I have paid her $189.

Q. What is her full name?

A. Mary J. Graham.

Q. And how did you pay that?

A. In cash; in money from time to time.

Q. What else have you paid her?

A. I gave her my note for $213 to balance.

Q. That makes $402.

A. That is what she figured I owed her, at $3.00 a week, from Nov. 18th to June 30th, '86.

Q. Did Miss Graham also look after matters of the house?

A. Oh, yes; she has taken charge of it. Of course I should have had to pay other people a good deal more, but she is an acquaintance. She has been an acquaintance of my wife for a good many years. They have known one another ever since they were girls, you might say.

Q. Well, from the day she was injured has your wife been able to attend to any household duties?

A. No, sir; none whatever.

Q. She could not move about?

A. No, sir.

Q. Now, can you give any estimate of the time you yourself have kept away from your work in looking after Mrs. Osborne since she was hurt?

49 A. Well, I couldn't tell how many days, for I didn't keep any account, but I know it is quite a number.

Q. A portion of the time you have been away?

A. For instance, last March she was—all through February and March and the first week in April, when she was very bad. I never kept any account of how many days that I stayed at home. Of course Miss Graham has been up with her at night time, and then I stayed home during that time in the day and done what I could for her; that was the way.

Q. About how much time have you lost?

A. Oh, I suppose I have lost a month; it will be all of that. I should think I would be safe in saying about a month's time since I left Detroit up to the present time.

Q. About how much time did you loose while here?

A. Well, I wasn't doing anything then.

Q. You were not?

A. No, sir; I wasn't.

Q. Well, now, in your petition, if I recollect right, you make a statement of the expense you have been subjected to for nurse bills and doctor bills, and there is a claim for services of your wife; no sum being mentioned.

A. Yes.

Q. Perhaps the committee would like to know what you claim her services worth. You ought to be willing to pay for the loss of her services (to committee).

Mr. DUFFIELD:

Q. You mean independent of these bills?

A. Yes; independent of these bills.

Mr. CANFIELD:

—. ——.

A. Well, I don't know how I can estimate a woman's services. I have an idea, for the sake of saving time, what I would be willing to take. I don't ask anything more than your committee think I am entitled to justly. I think I might double the bill if I felt so inclined. I have not charged a single cent for her board, which at two dollars a week is very low. I have not charged anything for the drugs and medicines, and I don't know how much they were, but I know it has taken every dollar that I could earn.

Q. Well, now, in regard to her services, you say it is difficult for you to estimate?

A. I suppose it would be difficult for anybody. I would like to see a man try it. I don't know where he would find the starting point.

Mr. DUFFIELD: Well, that is a barbaric cause of action.

Mr. CANFIELD:

Q. Well, then, Mr. Osborne, you may state what, for the sake of settlement, you would be willing to take for your wife's services over and above the expenses and bills you have been put to.

A. Well, there is $870, and a month's time of mine, at $3 a day, would be $90.00.

Q. Not your services, but your wife's services.

50 & 51 A. Oh, for the sake of a settlement I would settle it for about $1,800.00, bills included. I would not care about taking anything less; that is reckoning the woman pretty low.

Q. You paid out $870.00 for physicians' bills and nurse bills?

A. Yes, sir.

Q. If you were figuring your own time at $3 a day for thirty days—that would be $90.00—that would be $960.00 in all.

A. Yes, sir; it would.

Q. Is Mrs. Osborne a good housekeeper?

A. Good enough for me, sir.

Q. Well, I mean she is a good, competent housekeeper?

A. Yes, sir; she is; there is nothing that she cannot do.

Q. Mr. Osborne, you spoke about purchasing medicines.

A. Yes, sir.

Q. How often did you have to get medicines; did you keep any account of it?

A. Oh, no; the last prescription was sixty cents; got it at F. Slawson's.

Q. How frequently did you get medicine?

A. Quite frequently; that was since I went back to Cleveland; I got all my medicines there of F. Slawson.

Mr. DUFFIELD:

Q. Your physicians' and nurse bills and medicines would be about a thousand dollars—not to exceed that?

A. No, sir; I don't think it would amount to quite that.

Q. Will you settle for a thousand dollars?

A. No, sir.

Q. Elizabeth S. Osborne recovered a verdict of ten thousand dollars?

A. That is one thing, sir; it is like a bird in the bush.

Q. Well, she has got the verdict.

A. That is true, sir.

Mr. DUFFIELD: If Mr. Osborne would take one thousand dollars to settle it I would say pay it; otherwise I would say deny it.

Mr. OSBORNE: Gentlemen of the committee, I will offer to settle it for fourteen hundred dollars.

Adjourned until 2 o'clock Tuesday afternoon, November 30th, 1886.

Endorsed: 7104. U. S. circuit court for east. dist. of Mich. Elizabeth S. Osborne *vs.* City of Detroit. Motion. Filed Nov. 26, 1886. Walter S. Harsha, clerk.

(Here followed index to bill of exceptions, omitted in printing. See general index.)

52 *Bill of Exceptions.*

United States Circuit Court for the Eastern District of Michigan.

ELIZABETH S. OSBORNE, Plaintiff,
vs.
THE CITY OF DETROIT, Defendant.

And afterwards, to wit, on the fourteenth day of September, 1886, the said issue formed between the parties in the above-entitled cause came on to be tried before a jury duly empaneled, tried, and sworn; and thereupon the plaintiff, to maintain the issue on her part, introduced the following evidence:

The plaintiff's counsel made an opening statement to the jury, in the course of which he presented a diagram or map of the city of Detroit for the jury to look at. Counsel for defendant, Mr. Duffield, objected to counsel showing the map to the jury unless its

correctness was proven, which counsel for plaintiff did not offer to do, but stated that the map was one reduced from the city map. The court allowed it to be shown to the jury upon the statement of plaintiff's counsel that it was taken from the city map; whereupon the defendant, by its counsel, took an objection and exception.

And thereupon the plaintiff, to maintain the issue on her part, produced PAUL BATESON as a witness on her behalf, who, being duly sworn, testified as follows:

I reside at 34 Church street, in this city; have lived in Detroit 20 years; on Church street 5 years. I am a merchant tailor.

53 My place of business is at 10 Michigan Ave.; am of the firm of Bateson Bros. I never saw or knew the plaintiff in this cause before the time she tripped down. She had the fall on the upper side of the police station on Church street. The accident occurred in this way: I should think it was between nine and half past nine. I can't tell the exact time, and I don't know the date, because I didn't think it would come to trial. I was coming down to work in the morning and wasn't thinking about the sidewalk, and just as this lady was opposite me I happened to step in the hole where the plank had rotted away, near the center of the plank, and she caught her feet underneath it, and she had a basket in this hand and her other hand was in her pocket or something, and it tripped her right down on her forehead. I hardly noticed her when she fell, because I was thinking about something else. I was in a hurry, as I was very late that morning. She was stunned like, and I picked her up and took her in the police station. I was going down-town and she was going the other way. When I picked her up and took her to the police station I noticed that her nose and forehead were cut and she was bleeding profusely. They took her to the pen-stock and washed her face. I left her there. The walk had been in a bad condition for over three months. I had been in the habit of passing over there for five years previous four times every day. No one could step on it without tripping up; not even a child. The planks were loose, and there were three of them the same way. The Michigan-avenue end was very bad. This was between Michigan Ave. and Trumbull Ave., on the same side of the street as the police station.

54 Q. You have known of other accidents happening at this place?

To which question the defendant, by its counsel, then and there objected as incompetent and irrelevant and not within the issue; but the court overruled the defendant's objection and allowed the witness to answer the same; to which ruling and decision the defendant, by its counsel, did then and there duly except.

Q. To refresh your memory I will ask if a neighbor of yours or your wife met with an accident at that place.

To which question the defendant, by its counsel, then and there objected as incompetent and irrelevant and not within the issue, but

the court overruled the defendant's objection and allowed the witness to answer the same, to which ruling and decision the defendant, by its counsel, did then and there duly except.

Q. You say, Mr. Bateson, that some of the planks were loose?
A. The planks were loose and rotted clear through. I did not notice the stringers on which the planks were laid. I should think it was apparent to any observer passing along, as there was a large hole. Any one could see it. I have passed this walk every day with my wife and other persons.
Q. What precaution did you find necessary to take or your wife find necessary to take in order to avoid falling as she passed along with you?

Mr. DUFFIELD: That I object to; that is going still a step further.
COURT: Yes, sir; that does not tend to show notoriety, although it may have some bearing upon the state of the walk.
55 Mr. DUFFIELD: Then Mrs. Bateson should so testify.
COURT: No; I take it that he was with his wife.
Mr. DUFFIELD: The question is what his wife did. That involves an entirely new element——
COURT: I think it is admissible.

To which question the defendant, by its counsel, then and there objected as incompetent and irrelevant and not within the issue; but the court overruled the defendant's objection and allowed the witness to answer the same; to which ruling and decision the defendant, by its counsel, did then and there duly except.

A. About two months before my wife and I were walking
56 over the place and she kicked the ends of the board, and after that we went single file.

Cross-examination:

Some two months ago my wife kicked the end of the board that was raised up. I stepped on the board at that time. It was at the same place; it was the same board; it was somewhere about two months before. I gave no one notice of it; not the policeman. I live on the north side of Church street. There are only four houses on my side. It is about 200 or 150 yards, I think, from the police station. I walked over the sidewalk in question every day. The end of the sidewalk near Michigan avenue is very bad. Mrs. Osborne fell opposite the station. It was not on the bad end, near Michigan Ave. This end that she fell on was the worst, because the other end did not trip at all. This part was the worst part, but the very bad end was nearest Michigan Ave. This part was so defective that any one who looked at it could see it. It was rotted right through, so that after the accident happened the plank was picked up and pitched into the street, and laid there for two months after. It was rotted through to the dirt. I did not see that it was dangerous, because my mind was not on it. They could see it was rotted away. It was not a wet-looking condition of the boards, but it was

a notoriously rotten condition of the plank. This applied to the entire length. I remember a part there where they unloaded coal. I should think it was about nine feet away from where the accident occurred. The window in the station into which coal was unloaded was about nine feet from where the accident took place.
57 Mrs. Osborne did not give her name when she went into the police station. I stayed there only about two minutes, and during that time she never spoke at all. She was stunned, as I remember it now, but it was so long ago that I don't know whether she was hurt further than the bruises on her face or not. If I had thought she was seriously hurt I don't know whether I would have waited longer than the two minutes or not, as I was somewhat in a hurry, going to my business. I thought there were enough policemen there to take care of her. I don't know any of the policemen who were there. I am not acquainted with the policemen in this city much. I thought the superintendent—the head man of the station—was there. There were two or three there at the same time; don't remember the superintendent's name. I don't remember what kind of a day it was; it did not take my mind. I couldn't say whether the sun was shining. It did not rain nor hail nor snow. The accident happened just as Mrs. Osborne and myself were abreast. I was going one way and she the other, and she fell over. I was walking pretty fast, to the best of my knowledge. I didn't scarcely see the lady; can't tell whether I saw her coming before we met or not. I never saw her before and never saw her after that day until this day. I was going pretty fast down to my place of business.

Redirect by Mr. CANFIELD:

I was on the walk, the side nearest the police station. Say this was the sidewalk, and as I put my foot here she tripped over, and I heard her fall. I turned around and there she was.
58 She was outside the walk. I don't know how long Church St. has been a publicly travelled thoroughfare.

COURT: There will be no objection about that.

And thereupon the plaintiff, further to maintain the issue on her part, produced Mrs. ELIZABETH S. OSBURN as a witness in her own behalf, who, being duly sworn, testified as follows:

Examined by Mr. CANFIELD:

I reside in Cleveland, Ohio. As near as I can tell I am about 48 years of age. I remember the accident I met with on Church street; it was November 17th, 1883. I was living at that time at 310 Fourteenth street. It was about nine or ten o'clock in the forenoon, as near as I can remember, that the accident happened. I had been down-town on some business, on Lafayette Ave., corner of Griswold street. I walked down-town and was walking home. The accident happened on Church street. When I was going down-town from the place where I was then living I would sometimes come down Michigan and other times would go down Baker street. I never had

passed through Church St. before. The accident occurred like this: I had been down-town and transacted my business and had a brown basket with me and was going home; it was a bright day, but the wind was blowing and there was a cloud of dust coming up Michigan Ave., and to avoid the dust I thought I would turn off, and I turned off on Church St., and as I came along I saw a gentleman coming. I didn't think anything about it. I was not looking much. I was walking my usual gait. Just as I got near him all at once I tripped up and fell heavy on my head. The board sprung
59 up and I was terribly shaken up. I stepped my foot on the plank, or he did, and it struck me on the instep and I fell forward on my head and I lay there I don't know how long. I tried to get up, but I could not. He picked me up and carried me to the station. The blood gushed out of my nose. He left me there and the policemen took charge of me, bathed my face and put a plaster on my nose, and gave me something in a glass; I thought it was whiskey, and I sat there for quite awhile and I said I must go home; all my idea was to get home. I was feeling so shook up and bad. I got home at last; I don't know how, really, I got home. It seemed as though I was dazed; everything was in a cloud. My nose was cut badly and my forehead was badly cut and terribly bruised. I do not know how much I weighed at that time, but I was very strong and pretty heavy. My health was as perfect as a woman's could be; did my own work. Besides attending to my household duties I used to take in knitting, as the time was long on my hands and my house-work was nothing. I had a cottage; I do not know how far it is from where I lived, on Fourteenth street, down-town, as I never thought of it; I was accustomed to walk down-town and back twice a day for weeks. My health was good up to this time. When I got home I was feeling pretty badly, but thought if I rested and kept still the effects would work off; but instead of that I kept getting worse; I was very uneasy. I had a friend staying with me, and towards evening I got so uneasy I could not rest anywhere and a tingling sensation all along my right side, just as though — was running pins all in my right side. I didn't understand it and thought it was, of course, the fall and shook up.

60 In the evening I was so bad, but being a stranger—then my husband wanted a particular doctor, in whom he had great faith—a friend of his—and he went and got him in the morning; it was Dr. Gaylord. He examined me thoroughly and said that paralysis had set in. He asked permission to call in Dr. Gilchrist, and he also examined me thoroughly. I was very faint. My right side was getting very heavy and no use to it at all. I had a dreadful noise in my head. It was like a mill or machinery going off into a hum; like a bell sounding. This continued for months; it comes now; I have it now. Sometimes I am a little free from it and there is only a hum; then it comes back with force. The doctor examined my eye and said there was a clot over it.

Mr. DUFFIELD: Wait a moment. If the witness testifies with reference to the condition of her eyes from what the doctor says we object to it.

COURT: Yes, sir; that is true.

WITNESS: My eyes seemed in flashes and rings and everything looked in a cloud; I could not describe it. I cannot trust my eye now; there is no sight there. My sense of hearing is not like it used to be on that side; I have to hear with this ear. I cannot hear with the right ear distinctly; everything is in a kind of murmur. For months after I could not rest at all anywhere; I was very uncomfortable; I could not sleep nights. My arm was utterly useless; I can raise my arm only by this other hand. I have to drag my right leg after me; it became paralyzed very soon after the accident; it kept getting worse and worse. My arm became the same way. The side of my body I have no feeling in.

Mr. CANFIELD: May it please your honor, I would like to
61 have the witness exhibit to the jury or demonstrate to the jury that she has lost all sensation as well as use of her arm.

Mr. DUFFIELD: To that I object.

COURT: I think she may show it.

Mr. DUFFIELD: I will take an exception.

Mr. CANFIELD: Or, if your honor will admit, I will call the doctor and let him do it.

COURT: I think you had better call the doctor.

Mr. DUFFIELD: I take further objection to any demonstration by the doctor.

COURT: I think the doctor may subject her to a test to show that she has no feeling.

To which ruling and decision the defendant, by its counsel, did then and there duly except.

Dr. Gaylord, who was not there, but was subsequently sworn as a witness, then, in open court, with a pin, which was first exhibited in view of the court and jury and of defendant's counsel, and which said counsel might have inspected or examined, proceeded to thrust it into the right side of the plaintiff's face, her right arm, and leg. The witness was not sworn to act naturally or to give true manifestations of her feelings, nor was asked whether she felt the pricking on one side and did not feel it on the other, but from her actions the jury would naturally infer that she felt great pain when she was pricked on the left side and did not feel it when pricked on the right side. No objection was made at the time that the doctor was not sworn before the experiment was performed.

WITNESS: I have also had internal troubles besides this paralysis.
It caused diabetes. I have no control over those organs at
62 all. The urine passes off without my knowledge—I have no knowledge of it at all—every five or ten minutes during the 24 hours. I never was troubled in this way before. Before this I not only attended to my household duties, but did other work besides. Since this accident I have been able to do nothing. I was under the care of a physician in Detroit from November until June. Then I went to Cleveland. Since I have been in Cleveland I have been under the care of two physicians. The changes of the weather

and atmosphere affect me very much indeed. I tremble all over. I cannot contain myself hardly. I cannot rest nights. The other side of my body has been terribly tender and sore, and it pains me here (pointing to left side). This will continue a long time, then get better, then worse again; I am never free from it. Besides the attendance of physicians I had a nurse all the time; it was Miss Graham. She has now gone to Canada to visit some of her friends. I know where she is. Since I have been in Cleveland I have had two physicians there. I have been examined by other physicians in Detroit—Dr. Book and Dr. Gilmartin. Last Saturday I was examined by Dr. Gilmartin.

I have had my hair turn gray, one thing, which has taken place in my appearance since this accident. I had no gray hairs then. It commenced to turn gray right through my sickness. The
63 doctor noticed it first. I was unable to use my right leg for any other purpose except for balancing myself.

Cross-examination by Mr. DUFFIELD:

I think it was on Saturday that this accident happened to me. I think it was on Monday morning that Dr. Gaylord came to see me. From Saturday until Monday morning I had no physician. I walked home unassisted from the station; I preferred not to do so; it was not my choice, but they didn't offer a carriage; they didn't offer to send me home; the police mentioned a carriage. I am positive they did not offer to send me home in a carriage. They asked me what my name was, and I said it didn't matter. They did not ask where my residence was. I did say that it did not matter what my name was because all I cared about was to get home.

I do not remember either of the policemen who helped me; I don't remember either of their names. I heard that they were examined in the matter before a committee of the common council; I remember that one was Mr. Bender.

I cannot tell how long I was at the station, but it seemed a long while; I should think half an hour. The wind was blowing a light dust as I came up Michigan Ave. I turned off onto Church St. I lived on Fourteenth street. I lived between Michigan and—I have forgotten the name of the street—Delisle or some such street.

64 Q. Is there but one block between those streets?

A. No, sir; it is the other way. I could not tell how many blocks it is from Michigan avenue to where I was living at that time. Church street does not run across Fourteenth street. I don't know whether there is a continuation on Church street that runs across Fourteenth street.

Q. Going down Church street how did you get to your house?

A. I came out of the police station on Michigan Ave. I never had been that way before. I don't know whether I could have gotten to my house that way or not.

Q. You don't know where you were then living was situated, with reference to the station, or whether it was south, towards the river, from there, or north?

A. I can't describe it. I should think Michigan Ave. runs about west and Church St. runs a little south of west, and the distance gets a little larger between them until they meet, at Michigan Ave. My house is on Fourteenth street between the line of Church St. extended and Michigan Ave. extended. It is north of Church St.; I could not tell how far north. I would not be going out of my way in turning off of Michigan Ave. on Church St. It might make a little difference to go down Michigan Ave. until I came near the street that runs near my house and go down on that. My special reason for going around by the station was to avoid this cloud of dust that was coming up. That was the sole reason. I was examined by a committee of the common council who came to my
65 house, I remember. I think the testimony I gave then is correct.

Mr. CANFIELD: Do you make any question about the presentation of this claim to the common council?

Mr. DUFFIELD: No, sir.

Redirect — Mr. CANFIELD:

WITNESS: I had not passed on this walk before. I did not know of its defective condition.

And thereupon the plaintiff, to maintain the issue on her part, produced Dr. EDWARD P. GAYLORD as a witness in her behalf, who, being duly sworn, testified as follows:

Examined by Mr. CANFIELD:

I reside in Detroit. I have been a practicing physician since 1854. I have resided here since March, 1880. I know Mrs. Osborne, the plaintiff, very well now. I was called upon to attend her on the 19th day of November, 1883. I found her at home at that time sitting in a chair, and was told the story of her having been injured. I examined her to see the extent of her injuries, and found her with a bruised nose, quite badly cut, upon which there was a plaster, and a bruised condition of her forehead, black condition about the eye, and her right side showing evidence of having been badly shaken up. I asked her in regard to her injuries, and she told me what the accident had been, and, on examination, I found, in addition to the injuries visible to the eye, that she was comparatively deaf. I tested her with a loud-ticking watch, and she could hear with her right ear at a distance of three inches. The normal distance of this watch would have been four feet. I think, at that visit, with regard to her eye, I found her eyesight was
66 very much impaired. I passed one finger before her eye and then two fingers and then three, and found she could not distinguish between them even in a strong light. It was my impression that she hadn't noticed her failure in this respect. When I had learned the seriousness of her injuries I called Dr. Gilchrist. He examined her with me. Dr. Gilchrist is now in the State of Iowa, professor in the State University. At this visit Dr. Gilchrist

made an examination with an ophthalmoscope. I was was not able to do it, and he discovered——

Mr. DUFFIELD: Never mind what he discovered.

A. We found she was blind in the right eye and progressively deaf with the right ear, and after a very short time she lost the entire sensation of her right side, so that she was in the condition you have observed to-day, so that a sharp instrument could be penetrated in her flesh without any sensation at all, and she gradually lost the use of her right limbs. After a few days she also developed a condition of diabetes, insipient diabetes, or vast accumulation of urine, which she hadn't before. Her nervous system was badly shattered. She suffered intensely with noises in the head, which she compared with a train of cars going over a bridge, and also other noises intermingled with those. She had great restlessness and suffered from want of sleep, and she suffered increased sensitiveness of the opposite side of the body—a condition of hyperesthesia or increased sensibility of the opposite side. Even her clothing irritated her skin. It is not an uncommon condition of paralysis. As she progressed from day to day I found at one time she was unable to hear with her left ear and was greatly alarmed that she was
67 going to be paralyzed on that side also, but that passed away after two or three days, so that the ear was restored to nearly its nomal condition. She suffered from various complications, which is not necessary to render in detail, until she settled down in this condition of paralysis on the right side and hyperesthesia on the left side. There is no prospect whatever, in my opinion, of her ever recovering from this difficulty. The diabetic trouble, as I understand it from her, is quite as bad. Her inability to retain the urina results from the paralytic condition of the sphincters of the bladder. It is partially closed, and she is unable to retain it for any length of time, and it passes off without her knowledge as soon as there is any accumulation. I don't think there is any prospect at all of her ever recovering from that condition. In my judgment her present condition—the condition that I found her in and while she was under my treatment—is unquestionably due to that fall. I had seen Mrs. Osburn before I was called upon to attend her. It was some time before the accident, when I was living in Toledo, that I saw her. She was then a strong, vigorous woman. I treated her from about the 9th of November up to some time in June. My visits were every day; there might have been some exceptions. She had the care of a nurse continuously beside.

Q. What would be a reasonable sum, according to the usual charges of physicians, for your services?

68 Cross-examination by Mr. DUFFIELD:

WITNESS: I had seen Mrs. Osborn in Toledo. I had not attended her. I called at the house and had seen her at the house. I did not know that she had been suffering from heart disease. I never attended her after. I had never attended her at this time. I was then living at Toledo. I was practicing there. Mr. Osborne did

some work for me and I called in regard to the matter. I had a patient opposite their house, which I called to see every day for a year, and used to see Mrs. Osborne around in the yard and on the opposite sidewalk; that was in 1878 or 1879. I removed to Detroit in the spring of 1880; from that time to the time I spoke of calling to attend her I have not seen her at all. I don't remember the day of the week; if I remember, it was the 19th day of November. I fix the date from a memorandum that I made at that time. I am reasonably certain of that.

With the exception of some slight flashes of light, she is not able to discern anything with her right eye; she can tell the difference between light and darkness; this was before she went to Cleveland, in 1884; that was two years ago. I won't be positive of the exact amount of sight when she went away; but that is my impression—she could not distinguish objects.

69 I should say that she was absolutely blind in that eye. Anybody who can't tell the difference between objects is blind, as far as any practical use of the eye is concerned. I don't know how you could determine whether anybody is deaf, except only what they hear; that is the way to distinguish. If they should say that they do not hear I should say they were deaf, if they were reliable people. I should say that she is absolutely deaf in her right ear. I have not examined her recently in that particular.

The particular cause of the want of vision in the eye is the fall upon the sidewalk; the immediate cause is paralysis of the optic nerve. I think there is some effusion connected with it. I was not able to examine her with the ophthalmoscope; but, from the examination I made, I should think that that was the condition. My test was based upon what I heard from the examination of the other doctor and also by the symptoms which the case presented. I do not base my opinion as to the loss of eyesight upon the statement of the doctor. I base my judgment upon the test which I made. I examined her by passing the finger before the eye and asking her if she could see. I took her statement as to whether she could or could not see. I said something about her losing her hearing on the left side for a time; that passed off immediately.

Q. Now, if she was injured as you say she was, is not the fact that the other side would be more active—the physical senses would be more active rather than less?

A. If they were at all injured.

Q. You don't find them injured?

70 A. At that time there seemed to be danger of a permanent trouble on both sides; as it resulted, there was not.

On the left side I found a condition of hyperesthesia. Her hearing would not always naturally be a little better than if she had her hearing on the other side; it might be more sensitive to loud noises. She has not entire paralysis, only paralysis on one side; that is all.

Redirect:

Such a condition of paralysis is apt to result and frequently does result from such falls as the witness describes here to-day.

71 And thereupon the plaintiff, to maintain the issue on her part, produced ROBERT J. MOORE as a witness in her behalf, who, being duly sworn, testified as follows:

Robert J. Moore. I reside in Detroit. I am special police officer for the Hart Manufacturing Company of this city. I am connected with the police force of this city, and was in 1883, at Trumbull-Ave. station; it is sometimes called the Ninth-Ave. station. I was appointed and went on duty at that station May 1st, 1883. The police station fronts on Trumbull Ave. and towards Michigan Ave. There is a portion of the lot, of that triangular lot, on which the station is built that is vacant. That part of the sidewalk towards the intersection or junction of Michigan — and Church St. was very bad, in bad condition—that is, from the rear of the station to the junction—in 1883.

To the following part of which testimony, viz: "There is a portion of that triangular lot towards the intersection or junction of Michigan Ave. and Church St. that is vacant. That part of the sidewalk towards the intersection or junction of Michigan Ave. and Church St. was very bad, in bad condition—that is, from the rear of the station to the junction—in 1883," defendant, by its counsel, duly objected and moved that the same be stricken out, as it was not the place of the accident; but the court overruled the objection and motion and admitted the testimony; to which ruling and decision the defendant, by its counsel, then and there excepted.

WITNESS: I say that from the rear part of the station to Michigan Ave. it was in bad condition. I made a report to the board of public works in regard to the condition of that walk. I mean the
72 walk on Michigan avenue and Trumbull —, which I have referred to, right along by the station. I made the report to Mr. Sullivan, the inspector at that time. I noticed the condition of the walk from about the rear of the building to Michigan Ave. I was not upon that part of the walk. I was right at the junction where it comes out there to look. The walk there on Michigan Ave. and at the intersection was in bad condition; the boards were loose. I reported that and reported the other at the same time. I told them it was in a dangerous condition.

Mr. DUFFIELD: There is another objection. This is a report about the intersection as it exists now.

COURT: Was the report in writing?
A. Yes.

And thereupon the defendant, by its counsel, made a motion to strike out the testimony as to the report; which motion was not passed upon by the court.

WITNESS: I did not make any other report. This diagram shows approximately the condition of the streets there, and the police station; that is about the shape of the building. I should judge that the distance from the rear of the building to Michigan Ave. was about 25 feet. The appearance of the walk generally along there by the police station was that of an old walk. I could not state whether or not there was any difference in the walk along the side of the building and that from the rear of the building over to Michigan Ave. I just saw that from here. I could not state that until I went over it. There was no difference to attract my attention. My attention was not called to any difference in the appearance.

73 Cross-examination:

The part of the walk which I examined was where Church St. and Michigan Ave. run into each other. It is what they call the intersection. I could see that coming down Michigan Ave. or going up Michigan Ave. I did not turn up Church St. and walk by the station. As I was walking out Michigan Ave. and looking at the sidewalk it came to my attention that the Church-St. sidewalk was in a very dangerous condition. That would be apparent to any person walking along there and taking usual care. I noticed it from Michigan Ave., right at the intersection. I don't know whether the walk at the particular place where this lady was hurt was in a dangerous condition or not, as I never went over that. I had been there to the board of public works and made a report. I gave it into the office, and it was handed to Mr. O'Sullivan right there. I gave it to the clerk.

Q. It would not be your duty to give it directly to Mr. O'Sullivan?

A. Yes, sir; I could not tell the clerk's name to whom I gave it to. In fact I do not know. I could not say whether it is the same one that is there now. At all events he was a clerk in the office. This was in September, but I could not tell the exact day of the month. It was in the month of September, 1883.

Redirect:

It was a part of my duty as patrolman to take notice of these defects and report them.

74 And thereupon the plaintiff, to maintain the issue on her part, produced JAMES AUSTIN as a witness in her behalf, who, being duly sworn, testified as follows:

Examined by Mr. CANFIELD:

WITNESS: I reside in Detroit. I have lived here going on six years. My business is in a railroad office—secretary to the general manager of Lansing road—Detroit, Lansing & Northern. In November, 1883, I was residing on 14th Ave. I know Mr. and Mrs. Osborne. I lived on the same side of the street, in the first house north of them. I was their next neighbor. I had lived next-door neighbor prior to November 7th, 1883, in the neighborhood of a year, I should think. I think I saw Mrs. Osborne probably two or

three times each week. As far as I can judge, she was fully capable of attending to her household matters at that time. I heard of the accident that she met with about that time. I think it was about a week after the occurrence that I heard of it.

Q. Up to that time, say the middle or the 17th of November, what do you say about her physical condition, as far as her appearance indicated?

COURT: I don't think you need go to that. You have proven that sufficiently.

Mr. DUFFIELD: I will say, your honor, I do not intend to contradict it.

COURT: Yes, Mr. Canfield, you may regard that as proven; that she was a strong, healthy woman at the time of the accident. Unless you are attacked—if it is attacked—I will see that you are protected.

75 Mr. DUFFIELD: I don't intend to attack it.

Q. Will you state whether you, about that time you heard of this accident, had occasion to look at the sidewalk on Church St. near the police station?

A. I don't understand the question.

Q. Did you notice the condition of the sidewalk on Church St. opposite the police station?

A. Yes, sir.

Mr. DUFFIELD: Was this before or after the accident?

A. About a week after the accident.

Mr. DUFFIELD: To that I object.

COURT: I think that is competent.

Q. What do you state in regard to that?

To which question the defendant, by its counsel, then and there objected as incompetent and irrelevant and not within the issue; but the court overruled the defendant's objection and allowed the witness to answer the same; to which ruling and decision the defendant, by its counsel, did then and there duly except.

A. I met Mr. Osborne on my way to dinner—I forget whether it was Sunday or week day—and in speaking of the accident I stepped off Michigan Ave. on Church St. and looked at the sidewalk and found it had been recently repaired.

I can't tell you exactly how far from Michigan Ave. the place was where the repairs were made. I noticed the repairs had been made about half the depth of the building. I should estimate the building to be between 40 and 50 feet long.

Cross-examination by Mr. DUFFIELD:

I locate the time of the repairs because just about that time I moved across the road. I moved into a new house on the opposite side of the street—14th street. It was about the first of December that I moved over there.

76 It was not after I had moved into the new house that I saw the repairs; it was previous to that time. I cannot state

definitely how long before I moved into the new house; it may have been a couple of months; it may have been a couple of months before I moved into the new house that I saw the repairs. It was about the first of December that I moved into the new house. Two months previous would bring it along somewhere in the vicinity of the first of October. It was in September, in the fall of '83, I think, that I understood Mrs. Osborne was hurt. I cannot fix the date definitely, because I have no idea at the time of placing it in my memory. I thought when I saw the sidewalk repaired it was in September, 1883—September or October. I don't remember the time of the accident. Mr. Osborne pointed out the place to me. I myself couldn't know where Mrs. Osborne was hurt, excepting that it was on Church St. I knew nothing about it personally. All I knew about it was what I was told. I know Mr. Langdon. I believe Mrs. Osborne is his sister. Mr. Langdon is connected with me on the railroad.

77 And thereupon the plaintiff, to maintain the issue on her part, produced GEORGE S. OSBORNE as a witness in her behalf, who, being duly sworn, testified as follows:

Examined by Mr. CANFIELD:

WITNESS: I am the husband of the plaintiff. I was married in 1873. I remember the accident that she met with in the fall of 1883. I learned of the accident between 11 and 12 in the day. I was at home at that time. Between one and two o'clock the same day I went and looked at the place where I understood the accident happened. I saw that there had been a fresh plank replaced there and the old one or part of the old one was laid in the gutter or a little off from the gutter, more on the roadway, alongside of the Trumbull-avenue police station. An old plank lay in the gutter and a new plank had been apparently substituted. That was between one and two o'clock. It was on the same day. I remember going there with Mr. Austin. It was subsequent to the injury; it was about a week after the injury. Mr. Austin and I walked home together and went over the walk. The plank was still there.

No cross-examination.

Plaintiff's counsel puts in evidence a diagram of the place of the accident, made by Mr. Mandell from the city map.

A copy of this diagram, the original being lost, is hereto annexed with affidavit and marked Exhibit A.

Mr. CANFIELD: This diagram was prepared by Mr. Mandell
78 in our office, and I have him here to testify; but Mr. Duffield says he will waive the proof and take my statement that it was prepared from the city map, and that I believe it to be substantially correct.

Plaintiff's counsel states that plaintiff's only remaining witness is Dr. Book.

Dr. Book was subsequently examined.

And thereupon the defendant, to maintain the issue on its part, produced WILLIAM BENDELL as a witness in its behalf, who, being duly sworn, testified as follows:

Examined by Mr. DUFFIELD:

WITNESS: I am roundsman on the Metropolitan police. I have been such for about ten years. I know the Trumbull-avenue station. I was there in 1883. I was in charge of the station on day duty in that month—November. I had been there before November. I had been there during the whole year of 1883. I went there, to that station, in 1875 and remained there until I was transferred down to Woodbridge. That was in 1884 when I was transferred down there. I remember the occasion of a lady's falling on the sidewalk near the station. It was in the month of November, 1883. She was brought into the station-house assisted by a gentleman. (The lady is pointed out—the plaintiff in this suit.) That is the lady. The lady was brought to the door of the station-house
79 by a gentleman between the hours of 9 and 11 in the morning, who stated to me that she had injured herself on the sidewalk. She had a cut on the side of her nose and seemed quite faint. I got her a chair. She was bleeding from the cut on the side of the nose. It didn't seem to be a very bad cut, only the skin appeared to me to be rubbed off. I got her a chair and I put some plaster on the cut, and gave her a little whiskey and water as a stimulant, as she said she was feeling kind of faint. I asked her name and her residence, and both of those she refused to give me.

Mr. DICKINSON: State what was said.

WITNESS: I cannot exactly give the words now. I think she said she didn't care about it.

WITNESS: At that time I did not know that she was Mrs. Osborne. I did not take her home. She stayed there maybe about ten minutes and started off. She went alone; she went on foot. I first learned that she was Mrs. Osborne from bringing the case before the committee. The janitor generally takes care of the sidewalk and brass [grass], etc., about the station. The janitor then was Mr. Robertson; he is here. I had not previously had any occasion to notice the walk on Church St. alongside of the station-house. I noticed them about that time. That sidewalk was what I would call in pretty fair condition, and the plank that was supposed to have caused this difficulty was broken off on one end. I didn't see no plank broken in the center. I am now testifying about that part of the walk where Mrs. Osborne fell, alongside of the station-
80 house. When I say pretty fair condition I mean that the walk looked all right and apparently sound for travel, but the planks were a little worn and grass had grown in the intersections of the plank, because that sidewalk is very seldom used. Church street is only two blocks long, or was at that time. I don't know whether it has been enlarged since I have left the station; there were only two blocks then on the street, and it was seldom used on that side. During the time she was in there Mrs. Osburne

said she was troubled; she said she had heart trouble; she said that when she was sitting in the chair in the station-house.

Cross-examination by Mr. CANFIELD:

I won't be sure as to the language that Mrs. Osborne used when she spoke about the heart trouble, but it was either that she had heart difficulty or trouble with her heart. To the best of my knowledge now, she made use of one of those expressions. She had been brought into the station and was sitting there in a chair in a pretty faint condition—she seemed to be in that condition—in a sort of dazed, bewildered condition.

Q. Did she not state substantially this: That her heart then troubled her; that there was palpitation—express—the idea that there was a severe palpitation of the heart at that time?

A. She conveyed to me the impression that she was troubled with heart disease.

I would not like to say the language that she used there; do not pretend to remember the language at this date that she used there.

81 I made no note of it, for the simple reason that she didn't give me her name and residence to make a report of it. She refused to give her name and residence. I asked her name. I cannot give the exact language I used when asking her the question, because it is so long ago since it happened. All I can say is that she refused to give me her name. To the best of my knowledge, she said she didn't care about giving her name. I won't say they are the exact words or not.

Q. Can you testify that she used one single word that you repeated there from the stand?

A. All I can say is that she wouldn't give me her name or residence.

Q. Didn't she say this to you when you asked her about that, when she was in this dazed and faint condition you speak of, "Well, no matter about that now," or substantially that; "I want to go home?"

A. Yes; she said something about wanting to get home, and she went home—or at least left the station. I do not remember the man who helped or lifted her into the station, but being here yesterday I understood it was Mr. Bateson. I have no recollection of it. Mr. Bateson lives in that neighborhood. I am not in the habit of seeing him very frequently; I don't know that I noticed him any time on that street; I don't know him personally, anyway. I had been over this walk frequently prior to this accident, but I cannot tell you on what occasions or dates. I can safely say that I went over it three months prior to this accident. The last time prior to this accident was inside of three months previous to that. I stated, in my opinion, that the condition of this walk was pretty fair; I guess

82 I didn't examine it very closely; I only walked over it as any person would. A person walking over it for the first time might not detect any defects there, I suppose, unless by pretty close observation. I looked at the sidewalk on the day of the acci-

dent. I looked at it from the window. I saw a plank that was broken on the extreme end. I was sworn as a witness before the committee of the common council.

Q. Was not this question asked you and did not you answer in the way it is here: "Q. Did you come out onto the sidewalk? A. No, sir; I looked through the office window and saw a plank a little detached from the rest."

A. I say so now. It was loosened from the nails, apparently. I mean it was—it had in some manner become detached from the nails. The plank had not worn or rotted away from the nails, so that they no longer held it; it seemed loose. If a weight was brought upon the other end the other end would spring up; that was after the accident happened. I suppose the cause of the plank being a little to one side was made by the party tripping over it. There was no plank broken. There was no plank broken that I could see, only one on the end.

Q. How much of that was broken?

A. It would be something like this, as far as I could judge (illustrating). This examination was made standing inside of the station, looking through the window. I didn't go out to examine
83 the walk at that time. I think I went out and looked at the plank—looked at the sidewalk—some time that day. It was after the accident. The condition was just as I said now. I could not see any plank broken right in the center. I did not see one broken a little towards the end from the center. The only break that I saw was a little piece off the end of the plank, something like that (illustrating). I could not tell you what time of day that was. I did not make any more examination than that. I knew of the repairing of the sidewalk after the accident happened. I believe there was a man came there. Mr. Robertson, the janitor, told me that he had fixed the walk.

Mrs. Osborne was there about ten or fifteen minutes, to the best of my knowledge. She was there long enough for me to give her all the assistance that lay in my power while at the station. She was not bleeding to any great extent from the face that I could see. I wiped it off with a sponge, I believe, and put a plaster on it, and gave her a little whiskey and water. I cannot say that I noticed the bruise on her forehead, although there might have been one there. I did not make any note of the time she was there—the length of the time she was there. I was never called upon to recall it until I went to the common council, some months after. To the best of my knowledge, if I am not mistaken, Mr. Osborne, her husband, came there to the station a couple of days after the acci-
84 dent occurred. I don't think it was in the afternoon of the very day of the accident, although at that time I didn't know that he was Mr. Osborne, the husband of this lady. He did not call there and give his name and residence at the police station. I didn't take it, and he didn't tell me that he was the husband of the lady who got hurt. I believe he spoke to the captain. To the best of my recollection he didn't speak to me at all. He might have done it. I might have forgotten all about it. We have a great many different things to look after.

Redirect examination:

I was the roundsman then in charge of the station-house. Captain Myler has charge of the precinct; had at that time and has now. The officer on day duty is supposed to be in charge of the station individually, under his orders, and he is in charge of what we call the precinct, one or more stations in the city. Captain Myler is a captain of the police force. Captain Myler and myself were in charge of that building, representing the police department. The building was in our charge for the board of police commissioners. The property belonged to them.

By Mr. CANFIELD:

Q. Does not the city own the station-houses?
A. I believe it does.

85 And thereupon the plaintiff, to maintain the issue on her part, produced Dr. J. B. BOOK as a witness in her behalf, who, being duly sworn, testified as follows:

Examined by Mr. CANFIELD:

WITNESS: I am a practicing physician in Detroit. I have been for over ten years. I hold an official position. I am surgeon of the police department of the city. I know the lady sitting here, Mrs. Osborne; 8 or ten years ago I was called to see and examine her and see what her condition was, and three or four days ago I saw her with Dr. Gilmartin. I made an examination of her condition. I found her paralyzed on the right side, the paralysis arising probably from an injury, in my opinion. Any kind of a shock or blow would produce it; anything that would produce a contusion of the base of the brain or spinal column. I told her that I didn't think anything could be done for her. I think her injuries will be permanent; she will be permanently paralyzed. This may be produced by any sudden shock or contusion affecting the base of the brain or spinal column; that is apt to produce inflammation of the membranes; a sort of meningitis. Such a state as she is in—a state of paralysis—could not be produced by heart disease. I have not seen anything of the kind or heard of anything of the kind, and she has no heart disease; heart disease would not result in paralysis; she has a weak action of the heart; she is at an age when that would occur, of course, but there is no organic disease. I have spoken of paralysis. I refer to the paralysis of the whole of that side of the body, the sphincters and all—that is, the muscles that control
86 the bladder and rectum. She has no control over the action of the bladder at all. In my judgment, I should say that her case is incurable.

Cross-examination by Mr. DUFFIELD:

The symptoms or effects of the paralysis—it is on the one side of the body entirely, from the center of the body entirely down, and it draws the whole of the sphincters of the bladder, the rectum, and

the annus. She is not absolutely blind in the right eye; she has some sight in the right eye.

Redirect examination by Mr. CANFIELD:

WITNESS: She has a confused vision, undoubtedly. I treated the optic nerve, for it has been affected somewhat. I tested her hearing, and found her hearing very deficient in this right ear.

Mr. CANFIELD: Dr. Gilmartin is here and I will call him.
COURT: You need not call him.

Plaintiff rests.

And thereupon the defendant, to maintain the issue on its part, produced Dr. PETER GILMARTIN as a witness in its behalf, who, being duly sworn, testified as follows:

Examined by Mr. DUFFIELD:

WITNESS: I have been a practicing physician for some 20-odd years and am now. I made the examination of this lady that Dr. Book testifies to. I have heard Dr. Book's testimony. I don't think there is any difference in our diagnoses. I think I agree with him in all that he has said about it. I have heard here in this
87 court-room and from Mrs. Osborne the nature of the injury which she has sustained in falling on the sidewalk—a heavy bruise. I should say that in cases of that kind of injuries an immediate treatment is of material importance.

Q. In an accident of the kind Mrs. Osborne suffered from state whether or not a delay of 48 hours in receiving medical attendance would have any probable effect upon the case.

COURT: The question would be whether there was any negligence on her part in the delay, not whether the negligence itself was fatal.

A. Well, it would be rather an unfavorable point. I don't think she should have taken so long—for her. I should scarcely be able to decide the point as to whether, from my examination of Mrs. Osborne—whether it was or was not probable, if she had had prompt treatment, that these consequences might have been averted. It was a possibility, if she had had prompt treatment, that they might have been averted.

In a woman of Mrs. Osborne's fine physique, which she has testified to, I think I would have been very anxious to give her the benefit of very active treatment. If there was effusion about the eye and forehead, as has been testified to here, I should have leeched her or cupped on that portion of the head, practically, what is known as local blood-letting, and possibly at the base of the brain.
88 I would have leeched and cupped her; I would not have lanced it. That should be done within some hours after the injury—ten or twelve hours—any time within twenty-four hours, for that matter, but the sooner the better. If that sort of treatment was delayed forty-eight hours it would scarcely have been of any

use, ordinarily. However, the cases are numerous in which patients did not seem to realize the necessity of active treatment, and, for that reason, they had it postponed, and the results followed from this forgetfulness on the part of those about them.

Q. Are there instances where, under prompt treatment, in accidents of that kind the patient recovered?

A. I have known of some instances myself, of apoplexy, in which the fortunate presence of a physician there and using a lancet at once had a favorable result.

Q. Is there any other recognized mode of treatment by the profession in cases of this kind than prompt and semi-heroic treatment?

A. The treatment in the case of Mrs. Osborne seemed to be applied on the method of expectancy.

Q. I mean the treatment that she ought to have received, in your judgment.

A. I think I have already said that I should have interfered actively in the way of a little local blood-letting, and all that. It would depend upon the individual as to whether there is any other recognized mode of treatment by the profession in cases of this kind than prompt and semi-heroic treatment. Take the case of
89 Mrs. Osborne or a similar case. Individually, I certainly should have been inclined to interfere very actively in her behalf. What other physicians would do I could not say.

Q. You say you would have done that individually, and you base your opinion as to the propriety of doing that individually upon what?

A. The general experience in the books of the profession and the rules and principles of the art.

Q. Is it possible to say that these injuries might not have been averted if such treatment had been had promptly and at once?

A. I really could not answer that fairly.

Q. Then I suppose you do answer it?

A. In that sense. It is hard to say what peculiar change might have been brought about even with active treatment.

Q. She might have been cured, might she?

A. It would seem that the conditions were favorable in her instance to relieve her greatly of her present horrible state.

Q. It is in testimony that previous to this accident she was quite a strong and vigorous woman, even unusually so. Now, with that fact in the case, I repeat the question.

A. I should certainly have given her the benefit of her fine physical condition and have interfered very actively in her behalf.

Q. And if that had been done, I repeat again the question, Is it possible to say that this might not have been averted?
90 A. Well, no man knoweth. I do not think it would be possible actually and categorically to answer you on that point.

Q. Then you do answer it. If that treatment had been adopted at once she might have recovered?

A. I don't say she might have absolutely recovered, but her con-

dition would have been materially improved, in the respect that she would not be suffering from this difficulty about her eye, and the general symptoms of paralysis would be very much lessened. The features might not have been so badly injured, possibly, and her general condition. You notice that she suffers from impaired nutrition. She has a broken constitution.

Cross-examination by Mr. CANFIELD:

WITNESS: It is true that there — many instances of this kind, where a person has received a shock, resulting in the condition that Mrs. Osborne presents, where the sufferer or the patient at first does not realize the extent of the injury which they have received. The profession and the books of the profession recognize that as a fact.

Q. That patients who receive the injuries do not suppose it is necessary to take any immediate steps?

A. I am speaking in the abstract as to the necessity of treatment. I am not speaking of her.

Q. When you say that the treatment to which you referred might have mitigated somewhat the injuries and difficulties under which she labors you merely state that as a possibility?

A. That is my conscientious conclusion; it was a mere possibility.

91 And thereupon the defendant, to maintain the issue on its part, produced ROBERT ROBERTSON as a witness in its behalf, who, being duly sworn, testified as follows:

Examined by Mr. DUFFIELD:

WITNESS: I am janitor at the 20th-street station now; have been for five months. I was at Trumbull avenue before. Before that I was janitor at the Trumbull-avenue station for about eight or nine years; from 1877 to along about 1885. I was there during all the year of 1883. I remember the occasion of the accident to Mrs. Osborne, in November, 1883. I saw her when she was in the station. Sergeant Bendell, or roundsman Bendell, was attending her. I was there at the time she went away. I was in the cellar and I came up, and the sergeant said a lady had fallen on the sidewalk and there was a gentleman passing and tipped up a board and threw her down, and the sergeant told me to get a sponge and they sponged her off. She was skinned on one side of the nose and he put a court-plaster there, and after he had washed her off and put on the plaster she was kind of faint, and he asked her if she would not take some stimulant, and she didn't say much, and he got a little whiskey and water and gave it to her, and then he asked her where she lived and her name and she didn't want to give them, and she sat there awhile; she did not give it. He asked her if he should assist her home and she said no; she thought she could get home herself. She left the station. She stayed, I think, about a quarter of an hour there, and she got up and went home. She was quite nervous at the time she was being

washed, and she told the sergeant that she was troubled with
92 heart disease. I saw the place where she said she fell. There was a loose plank tipped out of its place, and there was a bit broken off the end of it, and after she went away I went out and mended it. There was one loose plank tipped out of its place. It was on the same day that she was hurt that I mended it; it was right after she went away. There were no more loose planks that I noticed. I looked over the walk—the lower part of the walk; there is a strip that comes at an angle there that does not belong to the Trumbull-avenue station; that was a pretty poor walk, but our part was a pretty fair walk. This plank was loose and a bit broken off the end of it—about angle-ways off (witness illustrates)—I think four or five inches off the one corner, as near as I could guess; that was the outside end of the plank next the street. The balance of the plank, from the broken part of which I speak to the inside of the walk, was not broken; it was all loose.

Q. With reference to this property which is not owned by the police station, how many lots is it? Look at that diagram and see if that is correct (showing diagram).

A. Yes; the station is here. We come over so far. There is a vacant corner there that belongs to the city. This part belongs to the city (pointing to diagram). That is vacant there. It is a sort of lawn; we cut the grass and take care of it. It is not fenced. It is not in charge of the police. The city always puts down the sidewalks. There is a portion of the walk which I said was quite bad; that is from where you call our place down to Michigan
93 avenue, from the rear to Michigan avenue. It is about 25 or 30 feet, I should guess; it may be two or three feet more. That part of the walk was not where Mrs. Osborne was hurt. She was hurt about—relative to the building—the center, near to the center of the building. I was around there two or three times a week cutting grass. I walked over the walk when I cut the grass. There is a little strip betwixt the house, about two feet, I think; the walk does not go into the house by two feet. I cut the grass there. In the summer time I cut the grass twice a week. This had got to November. When it comes cold weather I cut it about once a week. They get in coal at that station. I think we got in our coal in September that season. I did not get in any coal in October; we generally put *it* in in the fall enough to do us until the spring. I do not remember of getting in any coal later than September. After the coal is brought in I had nothing to do with reference to cleaning the walk or anything of that kind, unless it was sweeping the dust after the coal is brought in. I remember that time of sweeping it up. I saw the walk alongside of the station-house at that time.

Q. Did you observe it with care?

A. I saw nothing at the place at all. I went over it and swept it where the coal had been. I saw no loose planks. I did not see any defect at all at that time that I noticed. In my daily trip going to and from the station I went up Michigan avenue, up 13th street. I did not have occasion to walk over it in going to and from home.

94 Cross-examination by Mr. CANFIELD:

WITNESS: Coming on the fall we generally cut the grass there once a week. We cut the grass pretty late; we cut it to have it short, so as not to have decayed grass in the spring. We continue to cut the grass once a week to the end of the season; not till Christmas. I repaired the walk on the day of the accident. I put the old decayed plank in the cellar and put another in its place. The plank which I took down cellar was broken off a little at one end; it was not broken at the center. That was the outside end, next the street. I heard the testimony yesterday of Mr. Bateson.

Q. If it was only the outside end that was broken or defective at all, how do you account for that end springing up when Mr. Bateson stepped on the end nearest the station, if the end nearest the station was sound and solid?

A. If the plank was loose it would spring up.

Q. How many planks did you take up?

A. I finished that one and afterwards I brought down two more. I replaced the two others the next day. My reason for doing so was that I thought they were loose, rather, and I thought I had better put down better ones. They were not loose enough to do any harm, but I thought I had better put down better ones. I remember how wide the plank were that I put in there; they were foot boards, ten or twelve inches wide. The old planks were not six-inch planks right in that spot. I don't remember that I ever did see the plank

95 that was taken up and thrown into the gutter. We took the old plank down cellar so as not to have them lay in the street. We took them down that same day. I went out and repaired the sidewalk immediately after the lady went out and went away. I spoke about getting the coal in in September. It was in September that I swept the coal dust off from the walk. They were not in the habit of backing up their coal carts on the sidewalk that season; they used to do it; but there is about six or seven feet of lawn between the sidewalk and the street. Up to that season they were in the habit of backing their coal carts against the sidewalk and putting their coal across over the sidewalk into the cellar. I repaired the sidewalk on the day that Mrs. Osborne was hurt. There had been no repairs made to this walk prior to that time while I was the janitor of that station.

And thereupon the defendant, to maintain the issue on its part, produced SARAH TEAGAN as a witness in its behalf, who, being duly sworn, testified as follows:

Examined by Mr. DUFFIELD:

WITNESS: I reside at 330 Fourteenth street. My husband's name is Charles Teagan. I know the plaintiff, Mrs. Osborne. I have known her since 1882, while she has lived in the city here. I have lived as near as half a block to her; less than half a block. I knew of her accident shortly after it occurred. I knew of it sooner than a week or so. I knew it in a day or two. I had known her before

the accident. I had seen her frequently. I had seen her going to Michigan avenue—going to the house. I had talked with her some.

She would sometimes visit me on business. As to her health,
96 so far as I saw, before the accident, I have seen her come up and she would have a handkerchief around her face. She said her head troubled her—neuralgia. She told me that her heart troubled her; that was before she got hurt. I have heard her speak of it more than once. She would be coming from Michigan avenue, and she would seem to be really exhausted or tired, and I would be out looking for my children on the street and I would happen to accidentally meet her, and we would stand talking a little while. She said her heart troubled her—heart disease. She did not say anything about how it affected her breath or anything of that kind. She did not speak of any other trouble that she had. All she spoke of was the heart trouble and neuralgia. I saw her after the accident. It might have been a couple of weeks after the accident that I saw her. It was at her own house that I saw her. She was lying in her bed in her own house. She had on her clothes, or she had a shawl around her; it was a kind of a cold day. She was lying on the outside of the bed. This was not two weeks after the accident happened. I did not stay very long with her that day. I didn't see her move at all that time.

Q. I don't mean get out of bed, but move on the bed.

A. Yes, sir; she kind of turned around. She was turned in on the bed and she turned out. She turned without any assistance. I saw her again afterwards. The next time that I saw her it was in the next house. Mr. Austin went away—moved away—and I was there cleaning it, and her husband came in there; it was Mr. Austin who was a witness yesterday.

Q. Did the house belong to you or your husband?

97 A. Yes, sir; Mr. & Mrs. Osborne came in there; he fetched her in. With reference to helping her, I suppose he did. I didn't notice them when they first came into the room. The house did not have any furniture in it; the folks had moved out and I was sweeping it out. They did not stay very long. I didn't have any chairs or anything to sit down on; they stayed about fifteen or twenty minutes. There was nothing in particular for the occasion of their visit, except to see what repairs I was making to the house. I did not notice them go away; they did go away. I didn't notice them walk off, to observe whether Mr. Osborne helped her or not. I saw her go soon after that. I didn't fix this time; it was about three weeks or so after the accident occurred that they were in the house this time. I saw her again after that; it might be a couple of months after that that I saw her again. I saw her in front of the house; there was nobody there; nobody was there except herself and I; there was no nurse there; she said that her nurse went downtown; there was nobody there but she and myself. Mr. Osborne was not there. When I went in she was sitting by the window on a chair; it was the front window. I stayed about half an hour; during that time Mrs. Osborne moved; she got out of her chair; she said she had some occasion to go into the other room to see

about water in the kettle, she said, into the kitchen. That was an adjoining room. She got up from her chair and walked quite fast across the floor. I could not say that she walked up straight, but she limped along and got about as fast as anybody could get
98 around about. She went into the kitchen and came out again and sat on the chair. I did not assist her; neither did anybody else. She did not have any crutch or cane. I have had a conversation at the time of one of these interviews with Mrs. Osborne regarding her physicians' bills and about the fact that she had two physicians. She told me that she was not getting any better, and she said she had two physicians and she wanted to be excused about the rent; that she had to pay these physicians; that she was short for a week or two.

Q. She rented the house from you or your husband?

A. Yes, sir; and I told her I didn't see the use of having two physicians, and she said: "You know, Mrs. Teagan, it is the doctors who will make a case of it; it is no use of me to be talking." It was a case of her getting hurt on the sidewalk. She had spoken to me about having a claim; it was a claim against the city. I supposed that was what she referred to, that the doctors would make a case of it. I could not say that that was the reason she gave for having two physicians instead of one; she told me she had two physicians coming. I says, "I don't see what is the use of having two physicians coming, as long as you are not getting any better;" she says, "You know, Mrs. Teagan, it is the doctors who will make a case of it; it is no use for me to be talking."

99 Cross-examination by Mr. CANFIELD:

That is all I recollect she said about the two physicians. I didn't take any interest in that matter at all, so, of course, I didn't —. I spoke of her having her face bound up with a handkerchief. I have seen her in that condition three or four times. I have known her ever since 1882. In 1882 they rented our house, and she lived there two years and five weeks. In the two years and five weeks I saw her with a handkerchief before her face. It was before she got hurt. From the time she moved in until she got hurt I had seen her with a handkerchief about her face, with cotton batting inside of it. She complained of neuralgia and earache. It was not toothache; it was earache. I have been troubled with the neuralgia once within the two years. I went to her house shortly after the accident. It was then that I found her lying on the bed. While I was there I asked her how she was getting along, and she said poorly; she was not getting any better. I don't know as I said a great deal. I didn't stay very long in there. Her husband came along with some medicine. I said it was two months afterwards that I went in and found her sitting in a chair. The way I fixed the time was, it was coming on to spring. I have no dates at all. Their business didn't concern me a bit. She told one of my little boys (she was sitting at the window) that she wanted to see his ma, and I went down there. She then got up and went into the other room.

Q. Did she walk like a well person?

A. She walked very fast, but she limped just a little.

Q. Did she use both her arms?

100 A. She walked right along. She used one of her arms, but I didn't notice that she used the other. She walked along as if she had a lame spot in her, but she walked very quick. She walked into the next room. There is a front room with folding doors between, and then there is a kitchen off that.

Q. What was the distance, do you suppose?

A. The front part of the house is thirty feet long, and then there is a kitchen off that about 14 feet. I saw her also in the house Mr. Austin occupied at one time. That is the next house. The houses stand close together; the two houses stand on fifty feet, and the entrances come together; there is just a step between. What I said here was that she came out without any assistance of her husband, and came in to see what I was doing in that house. I did not invite them to come in. They didn't stay a great while, because I had no chairs to offer them to sit on.

Redirect examination:

Q. You say she used one of her arms. How did she use it?

A. She walked right along. I could see her hand hanging down. I didn't notice the other—I mean I saw something moving as she walked along.

Mrs. ELIZABETH S. OSBORNE recalled.

Examined by Mr. DUFFIELD:

Q. When you moved from the house which you rented of Mrs. Teagan to Cleveland you walked from the house to the car, did you not?

101 A. I walked with the assistance of my nurse; dressed up and walked along, just as I walk across this floor now. I did not walk and carry a valise at the time I left the house. I walked, assisted by Miss Graham, my nurse, who had always taken care of me. She put her arm around my waist and walked along with me. We walked a little ways and then we stopped. We took the Baker-street car. I could not tell you how far it is from my house to Baker street. It seemed a long ways then. I don't know how many blocks it is. I think the name of the street near my house was Dazell.

Mr. Osborne states that it is Lasell street, between Michigan avenue and Baker street, and that the distance Mrs. Osborne walked was two blocks.

Defendant rests.

Plaintiff rests.

The foregoing is all the testimony that was introduced on the trial of said cause.

102 And thereupon, the evidence being closed, the defendant's counsel requested the court, in writing, to charge the jury as follows:

1. That the plaintiff cannot recover in this case, because the liability, if any ever existed, on the part of the city has been abrogated by act No. 214 of the Public Acts of 1885 of the State of Michigan, approved June 17th, 1885.

2. That if the plaintiff recovers anything under her declaration in this cause she cannot recover to exceed $1,800.

3. That if the jury find that the alleged defective sidewalk was adjoining to and abutting a police station of the city of Detroit, in the custody and control of the Metropolitan police commissioners of the city of Detroit and their patrolmen and agents, then the plaintiff cannot recover in this case.

4. That if the jury believe the testimony of the plaintiff and of the witness Bateson, called in behalf of the plaintiff, then the plaintiff was guilty of contributory negligence and cannot recover in this case.

5. That upon the plaintiff's own testimony she is guilty of contributory negligence and cannot recover in this case.

6. That upon the testimony of the plaintiff herself she allowed forty-eight hours, namely, from Saturday morning until Monday morning, to pass without calling in any medical aid or
103 assistance at the most critical period of her injuries, during which time it appears, from the testimony of Dr. Gilmartin, that prompt and efficient treatment might have prevented all the more serious consequences of the injury from which she is now suffering, and there is nothing in the testimony from which the jury can rightfully determine what might or might not have been the extent of the plaintiff's injuries had she received prompt and proper treatment.

Therefore the plaintiff cannot recover in this case damages for any permanent or consequent injuries, but only for the pain and suffering occasioned by the direct wounds of the fall.

7. That inasmuch as under the testimony it clearly appears that the plaintiff's own neglect of her case in delaying to summon medical aid for a period of forty-eight hours after the injury may have contributed in a great measure to the permanent injuries from which the plaintiff testifies she is now suffering, and there are no data in the case from which the jury can rightfully determine what the plaintiff's injuries would have been had she received prompt and proper treatment, the plaintiff cannot recover in this action any damages based upon any permanent or progressive injuries to her constitution.

Each and every one of which requests said circuit court refused to grant as prayed, and to each and every one of said refusals the said defendant, by its counsel, then and there duly excepted.
104 And thereupon the said circuit court charged and instructed the jury as follows:

Charge of the Court.

GENTLEMEN OF THE JURY: This is an action to recover of the city of Detroit damages sustained by the plaintiff by reason of the al-

leged defective condition of a sidewalk upon the north side of Church street, in this city, between 8th and Trumbull Aves. and in front of what is known as the Trumbull-avenue Metropolitan police station.

In order to entitle the plaintiff to recover she must satisfy you by a preponderance of testimony, first, that the sidewalk was defective; second, that the city had notice of that defect, and, third, that without any fault upon her part she sustained damages by reason of it. It seems that the plaintiff was going home from the center of the city and walked up Michigan avenue, and as there was considerable dust and considerable wind blowing that day, instead of going onto the street beyond, which she was accustomed to do, she turned off the wide avenue upon Church St. at this point, and while proceeding along the north side of the street she met the witness Bateman, who was coming down-town, that being his usual course, and as she approached him, got very near to him, he stepped upon a plank, the end of which flew up; she tripped upon that plank, struck her instep against the plank, and fell forward upon her face, bruising her nose and forehead to such an extent that she was dazed,
105 and went into the police station, where her wounds were sponged and some stimulant was given her, and she afterwards went home, and from that time a progressive paralysis set in and resulted in her present condition.

Now, then, the first question in the case is, Was the sidewalk upon which she fell, in fact, defective, and what was the nature of the defect? Mr. Bateson, the first witness, says that the sidewalk there had been for months in a bad condition; that he knew the walk very well, as he had passed there two or three times a day for five years; that there were three planks loose at the point where the accident occurred, but that at the Michigan-avenue end, which was a little to the eastward, as I understand, of where the accident occurred, and between the rear end of the police station and Michigan avenue, the sidewalk was in a very bad condition, leaving it to be understood that it was not in such bad condition where the accident occurred. The plaintiff herself says that the sidewalk where she fell was in bad condition, and evidently so—so that it was palpably in bad condition, and that there were several planks loose there, one of which was the one over which she stumbled. The testimony of Mr. Osborne is that the walk was repaired very soon after that and within a week after the accident occurred. The testimony on behalf of the defense on that subject is that of Mr. Bendell, the policeman, who says that the walk there was in a fair condition—the walk just where the accident occurred was in a fair condition—although I believe he admits that the walk further east was not in good condition. Mr.
106 Robertson, the janitor of the police station there, said that there was one loose plank at that point, but that the other part of the walk—that is, the part of the walk in front of the police station, where the accident occurred—was generally good, and that at the east end, to the rear of the station, the walk was in bad condition.

Now, gentlemen, that is the substance of the testimony upon the condition of the walk without going into the details. I believe that is the substance of the testimony upon that point. Policeman Moore

also testified. I understand Mr. Moore only testified as to one section. Mr. Moore testifies that the walk near Michigan Ave. was bad. I do not know. I have not in my minutes anything with regard to the walk where the accident occurred, but further east than that he said the walk was bad. Now, gentlemen, it is for you to say as to whether the walk was in such condition as to render the city liable for negligence in that connection. There is no doubt that the city, as a matter of law, is bound to keep its sidewalks in reasonably good condition, having regard to the number of persons passing and repassing, and that the degree of repair, the excellence of the condition, would depend to a considerable extent upon the amount of travel that there was upon it. Now, gentlemen, in the second place, there must be notice to the city of this defect to charge them with negligence. It may be either expressed or implied. There was no express notice given here. There was an attempt to show it, but as the report was not produced that testimony of Mr. Moore was ruled out, and the case rests upon the question whether the defect had existed so long as to charge the city with negligence in failing to repair it,
107 for the law is this: If the defect were a recent one—for instance, had occurred a day or two before that—the city would not be liable, because the city would not be chargeable with negligence where the defect was so recent, but if a long time had elapsed, so that persons passing and repassing there would notice the defective condition of the walk, why, then, the officers of the city whose duty it is to repair the walk would be presumed themselves to have had the same notice, and would be chargeable with negligence in failing to have it repaired. Now, then, the question is, If you shall find this walk was defective, whether that defect had existed so long as to render the city chargeable with notice. In that connection I think you are entitled to consider the fact that the accident occurred in front of the police station and within sight of the officers whose duty it was to have charge of the station, to take care of it, and the testimony of Mr. Bateson, who says that the walk had been three months in bad condition, so far as he knows it. He is one of the witnesses who testifies that that portion of the walk had been in bad condition for any length of time, although the officers of the station admit themselves that the walk to the east of there, near the Michigan-avenue end of the street, had been in bad condition for some considerable time. Now, gentlemen, it is for you to say whether you are satisfied from this testimony that the walk had been in bad condition for a sufficient length of time to apprise the city of the fact and to render it chargeable with negligence in failing to notice the defect and have it repaired. Now, then, in defense of this
108 action and to the whole action, the city claims that the plaintiff was guilty of contributory negligence, and if you shall find that she herself was guilty of negligence in falling upon this sidewalk, then she cannot recover. The burden of proof is upon the city to satisfy you that she was guilty of contributory negligence, and the claim is that, from her own testimony, it appears that the sidewalk was so openly and so manifestly bad that she was chargeable of negligence in walking over it. Well, now, I charge you, as

a matter of law, that if the sidewalk was so bad as to be manifest to a person approaching it or walking toward it—the sidewalk there was so bad as to be perfectly manifest to any one who was walking along there—then she should not have made use of the sidewalk, but still I can conceive that a person might, without any negligence upon her part, make use of a walk which the city might be chargeable with negligence in maintaining, and the question, for instance, if other parties not knowing it they might not know the defect, or if for any reason the vision of the party was obstructed or their attention was diverted to some other object of interest they might pass over a defective sidewalk without being guilty of what the law calls "contributory negligence," and it is for you to say, under all the circumstances of this case, whether the plaintiff was guilty of contributory negligence in passing over the walk at this point. You are entitled to consider in this connection the fact that the immediate cause of the injury was not her stepping on the plank, but the fact that Mr. Bateson stepped upon the plank, and for his negligence, which contributed to the injury, she would not be responsible.

If the testimony would indicate it shows conclusively,
109 I think, the injury to her was caused by Mr. Bateson stepping upon this plank and raising it suddenly in front of her. It is possible that while Mr. Bateson might have been negligent in stepping upon that plank which he knew to be loose, and the testimony is pretty strong upon that point, because he is shown to be acquainted with the sidewalk and knew it was in bad condition and had been for some months, that he might not have been able to recover if he had fallen. She might have gone to the walk and been tripped up by Mr. Bateson's act of stepping upon this plank without any fault on her part. I shall leave it for you to say, gentlemen, whether, under all the circumstances of this case, you think she was guilty of contributory negligence, and this exclusively in these cases is a question for the jury. There have been a number of cases where the evidence of contributory negligence was so strong that I deemed it my duty to take the case from the jury and direct a verdict for the defendant, but I consider, however, in this case that two reasonable persons might come to quite different conclusions with regard to that—with regard to whether the plaintiff had been guilty of negligence or not—and in such cases the law is that it is for the jury to determine, and I shall, therefore, leave it to you in this case to say whether upon all these facts you think the plaintiff was guilty of contributory negligence. If she was not, then, so far as that is concerned, she is not debarred from recovery; if she was, that is an end to the case and your verdict should be for the defendant. Now, supposing you find, gentlemen, that the sidewalk was defective and that the city was chargeable with notice,
110 with negligence in failing to repair it, and the plaintiff was not guilty of contributory negligence, then she would be entitled to recover, and the remaining question would be as to the damages she suffered. Now, upon that point there is very little conflict of testimony. The woman was taken into the police station there by Mr. Bateson, where she had her head sponged and was administered

some whiskey or other stimulant, and after she had had a piece of court-plaster put upon her forehead or nose she walked home. On reaching home she supposed that she was not seriously injured and was able for some time to go about the house, and it would seem from the testimony that progressive paralysis set in very soon after her fall and has continued from that time to the present; that for some time after that she was able to walk and do her household duties, but that the paralysis gradually increased in intensity and has resulted in her total disability and in a complete numbness and want of feeling in her right side and in her inability to hear out of her right ear or to see with any useful vision out of her right eye; that her right arm and leg are totally incapable of motion, and that she is permanently and completely disabled, and that she is hopelessly a paralytic. Now, gentlemen, if you will find this to be the case, why then, under that you would be justified in saying her injuries were very serious. In defense of this, however, it is said, and I charge you in this connection with regard to the amount of damages, that she is entitled to recover for her pain and suffering; she is not entitled to recover for her medical attendance, for that is something for which her husband was chargeable. She is entitled to recover for her pain
111 and suffering, and she may recover not only the amount of damages which she suffered prior to the commencement of this action, but also all the damages proceeding continuously from the injury complained of which she has suffered up to this time, and which it is reasonably certain that she will suffer in the future. There must, however, be a reasonable certainty to such evidence of damages. A mere probability of its recurrence is not enough to justify you in finding damages hereafter—that is, for her future suffering. You must be satisfied that she is beyond the probability of any recovery, and if you are satisfied of that, then you may give her damages not only for her pain and suffering up to this time, but for what she will endure in the future. The defense to this part of the case is that the plaintiff in this case did not send for a physician as soon as she should have done. The accident occurred on Friday, as I understand, or Saturday morning, and she did not send for a physician until Monday, although she was in pain from the time that she received the injury. Now, in that connection, I charge you that the plaintiff cannot recover for a damage which she might have avoided by the use of slight care and diligence after first becoming aware of the injury of which she complained, the general rule being that the plaintiff cannot recover for damages which she might have avoided by the use of ordinary care and diligence. She is not, however, necessarily debarred from recovery for the whole extent of her injury by reason of her not sending for a physician on Saturday. It is only in case you should find that she was negligent in not sending for a physician on Saturday that she would be debarred
112 from recovery. Now, sometimes a person, as I have remarked to counsel in the progress of the trial—a person will receive a very slight injury, apparently, and yet it may turn out to be a very serious injury, and the injury may at first be so slight that he does not feel as though he would be authorized to call in the aid of

a physician, and yet in the course of time more serious symptoms may set in and the injury may prove to be even a fatal one, as, for instance, suppose a person was to scratch himself with a knife and blood poisoning should set in after two or three days, I should hardly say that the mere fact that a person scratches himself with a knife would render it negligence upon his part not to call a physician immediately. Scarcely any person would do that with a mere scratch with a knife, and yet the scratch of a knife may prove, if the knife happens to be poisoned, to result in blood poisoning or in lock-jaw or in some fatal disease. Well, now, if the injury was so trivial as not to call upon a reasonable person to call a physician immediately, why, then, the fact that she did not call a physician at once would not bar or preclude her from recovering the whole damage for the whole injury which afterwards the accident may be shown to have resulted in; but, on the other hand, a person who suffers an injury or is injured in any way by the negligence of another is bound to use ordinary care to make the injury as light as possible, and if you should find in this case that the injury was so severe as to have called upon the plaintiff, as a reasonable person, at once to send for a physician, and that if she had sent for this physician the serious consequences—the almost fatal consequences—which resulted
113 would not have been occasioned, then you should limit her recovery by so much. The question is, then, Was she negligent in failing to call a physician at once?

I charge you, gentlemen of the jury, that the jury cannot award what is known as exemplary or punitive damages in this case, for there is nothing to show that the city was guilty of any malice or any deliberate intention to injure the plaintiff. It is only in such cases that you are called upon to give what is termed as exemplary damages, but the damages are limited to those which were actually suffered by the plaintiff.

I believe, gentlemen of the jury, I have called your attention to all the questions of law arising in this case. The case is in your hands. You will retire in charge of an officer to consider of your verdict. Swear an officer.

And thereupon the counsel for the defendant then and there duly excepted to so much of said charge as left it to the jury to consider the condition of the sidewalk elsewhere than at the place of the accident, referring to the sidewalk abutting the lot in the rear of the station.

Also to that part of the charge which said that the jury might consider the fact that the accident occurred in front of the police station and in sight of the officers whose duty it was to take care of it.

Also to so much of the charge as said that the burden of proof as to contributory negligence was upon the defendant.

114 Also to the illustrations by the court of what would excuse a person from passing over a dangerous and defective sidewalk, as, for instance, "if for any reason the vision of the party was obstructed or their attention was diverted to some other object of

interest they might pass over a defective sidewalk without being guilty of what the law calls 'contributory negligence.'"

Also to that part of the charge which said that the jury might consider the fact that Mr. Bateson's stepping on the plank was what caused the accident.

Also to that part of the charge which stated that the plaintiff is not necessarily debarred from recovering damages for the whole extent of her injury by reason of her not sending for a physician until Monday, and in that connection to the following part of said charge:

"Now, sometimes a person, as I have remarked to counsel in the progress of the trial—a person will receive a very slight injury, apparently, and yet it may turn out to be a very serious injury, and the injury may at first be so slight that he does not feel as though he would be authorized to call in the aid of a physician, and yet in the course of time more serious symptoms may set in and the injury may prove to be even a fatal one, as, for instance, suppose a person was to scratch himself with a knife and blood poisoning should set in after two or three days, I should hardly say that the mere fact that a person scratches himself with a knife would render it negligence upon his part not to call a physician immediately.
115 Scarcely any person would do that with a mere scratch with a knife, and yet the scratch of a knife may prove, if the knife happens to be poisoned, to result in blood poisoning or in lock-jaw or in some fatal disease. Well, now, if the injury was so trivial as not to call upon a reasonable person to call a physician immediately, why, then, the fact that she did not call a physician at once would not bar or preclude her from recovering the whole damage for the whole injury which afterwards the accident may be shown to have resulted in."

And inasmuch as the aforesaid matters do not appear for record, this bill of exceptions has been settled and signed this first day of December, A. D. 1886.

HENRY B. BROWN, [SEAL.]
United States District Judge.

(Here follows diagram marked page 116.)

117 The Circuit Court of the United States for the Eastern District of Michigan.

ELIZABETH S. OSBORNE
vs.
THE CITY OF DETROIT.

STATE OF MICHIGAN, *County of Wayne*, } *ss:*

Henry A. Mandell, of Detroit, being duly sworn, deposes and says that he drew the diagram of the Trumbull-avenue police station and vicinity offered in evidence and used in the trial of said cause; that said diagram was taken from the official map of the city of Detroit and was an enlargement of the same, being exactly similar and sub-

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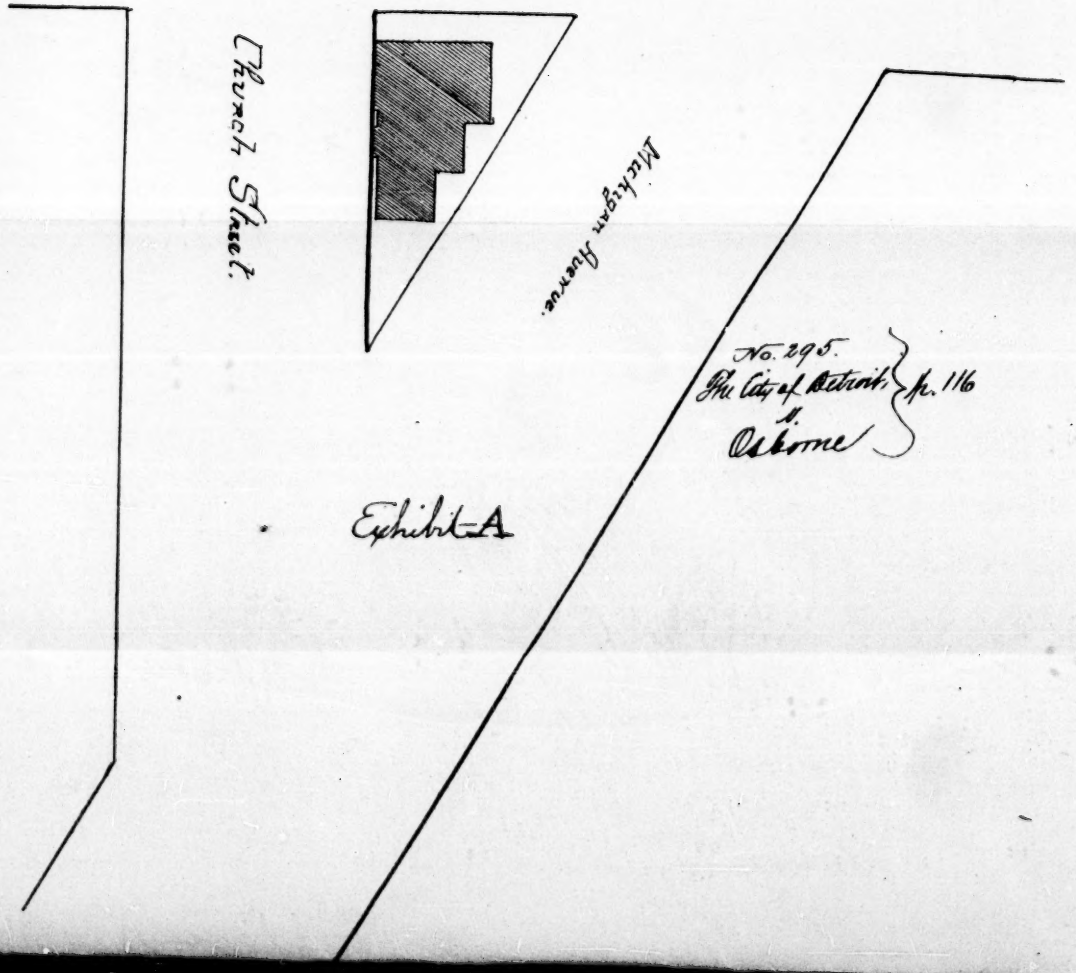
Trumbull Avenue. 116



stantially the same on a larger scale; that the annexed diagram is similar and substantially the same as that used at the trial of said cause and on or about the same scale, and is similar in every respect to the official city map and on a larger scale, and that deponent drew the annexed diagram; and further deponent saith not.

HENRY A. MANDELL.

Subscribed & sworn to before me this 29th day of November, 1886.

JULIA LINCOLN,
Notary Public, Wayne Co., Mich.

[Endorsed:] 7104. U. S. circuit court. Osborne *vs.* City. Bill of exceptions. Filed Dec. 1, 1886. Walter S. Harsha, clerk.

118 THE UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the writ of error duly issued on behalf of the city of Detroit in the case in said court wherein Elizabeth S. Osborne is plaintiff and the said City of Detroit is defendant, and which is hereto attached; that the above and foregoing is a true copy of the record of this court in said cause; that I have compared the same with the original record, and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this thirty-first day of January, in the year one thousand eight hundred and eighty-seven, and of the Independence of the United States of America the one hundred and eleventh.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA, *Clerk.*

Endorsed on cover: E. Michigan C. C. U. S. No. 295. The City of Detroit, plaintiff in error, *vs.* Elizabeth S. Osborne. Filed February 19, 1887.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 295.

THE CITY OF DETROIT, PLAINTIFF IN ERROR,

vs.

ELIZABETH S. OSBORNE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF OF HENRY M. DUFFIELD,

Attorney for Plaintiff in Error.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

THE CITY OF DETROIT, *Plaintiff in error,* vs. ELIZABETH S. OSBORNE, *Defendant in Error.*	*October term, 1889.* *No. 295.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The plaintiff in error has been since 1806 and still is a municipal corporation of the State of Michigan, having a charter from the Legislature of that state.

Those portions of its charter in force at the time of the accident to the plaintiff below, bearing upon the controversy, are as follows:

TITLE I.

CHAPTER VII.

"(SECTION 116) SEC. 33. The Common Council shall have power to make, grade, improve and adorn the public squares, spaces, grounds and parks belonging to or under the control of the corporation, and to control and regulate the same consistently with the purposes and objects thereof. It shall have power to establish, open, widen, extend, straighten, alter, vacate and abolish highways, streets, avenues, lanes, alleys and public grounds or spaces within said city, and to grade, pave, repair and otherwise improve the highways, streets, avenues, lanes, alleys or interior public spaces created by the intersection of streets, crosswalks and sidewalks in said city, with stones, wood, brick or other material; and the Common Council shall have full power and authority to provide for the paying the costs and expenses thereof by assessment in such manner as shall be prescribed by law, which assessment shall be a lien, until paid, upon the lot, lots or premises on which the same are bounded, and shall be collected in such manner as shall be authorized by law." * * * * *

Local Acts, (Mich.) 1883, p. 604.

"(SECTION 140) SEC. 57. The Common Council shall have power to provide and ordain by ordinance that whenever any sidewalk requires to be built or repaired, the said Council may direct the Board of Public Works to notify the owner, agent or occupant of any lot or parcel of land in front of or adjacent to which such walk is required to be built or repaired, to build or repair the same; and that if such agent, owner or occupant shall

neglect, for a time to be specified in the ordinance, to do such building or repairing, it shall be the duty of the said Board to at once do, or cause the same to be done; and in such case the expense theroof shall be assessed upon such lot or parcel of land, and shall be a lien thereon until collected and paid in a manner to be prescribed in such ordinance; and the owner so neglecting to build or repair shall be liable to the city for all damages which shall be recovered against the city for any accident or injuries occurring by reason of such neglect, and also to prosecution in the Recorder's Court, and, on conviction, to be fined not to exceed five hundred dollars and the penalties in the City Charter elsewhere provided. The Common Council shall also have power, by ordinance, to designate and determine the materials of which all sidewalks in the city shall be constructed, and to regulate their width and manner of construction." * * * * *

Local Acts (Mich.) 1883, p. 614.

From 1857, and subsequently to and including 1871, the following were the only provisions in the Charter of the City of Detroit in anywise bearing upon the question of the city's liability for injuries from defective sidewalks:

"CHAPTER V.

"(SECTION 103) SEC. 22. The Common Council * * * shall have power within the limits and jurisdiction of the corporation * * *

"11. To establish, open, widen, extend, straighten, alter, vacate and abolish highways, streets, avenues, lanes, alleys and public grounds or spaces within said

city, and to grade, pave, repair and otherwise improve the highways, streets, avenues, lanes, alleys or interior public spaces created by the intersection of streets, crosswalks and sidewalks in said city, with stone, wood, brick or other material; and the Common Council shall have full power and authority to provide for paying the costs and expenses thereof by assessment on the owner of the lot or premises in front of or adjacent to which such highways, streets, avenues, lanes, alleys, interior or public spaces, crosswalks or sidewalks may be directed to be graded, paved, repaved or otherwise improved." * * *

Laws of Michigan, 1857, pp. 94 and 96.

"(SECTION 105) SEC. 24. The Common Council shall have power * * *

"3. To provide and ordain by ordinance, that whenever any sidewalk requires to be built or repaired, the Common Council or any Alderman may direct the Street Commissioner to notify the owner, agent, or occupant of any lot in front of or adjacent to which such walk is required to be built or repaired, to build or repair the same, and that if such agent, owner or occupant shall neglect, for a time to be specified in the ordinance, to do such building or repairing, it shall be the duty of the Street Commissioner to at once do or cause the same to be done, and the expenses thereof shall be a lien upon the lot, to be assessed therein and collected in a manner to be prescribed in such ordinance, and further to provide that the owner, agent or occupant so neglecting to build or repair shall be liable to the City for all damages which shall be recovered against the City for any accidents or injuries occurring by reason of such neglect,

and also to prosecution in the Recorder's Court, and on conviction to be fined not to exceed fifty dollars, and that if the Street Commissioner neglect, when required to give such notice, or to have such walk built or repaired within such time as such ordinance shall prescribe, he also shall be liable to similar prosecution and fine." * * *

Laws of Michigan, 1865, pp. 678, 679.

Defendant in error in her declaration in the Court below, averred in the first count, that "whereas the said defendant is a municipal corporation under the laws of the State of Michigan, having a charter granted by the Legislature of the State of Michigan, under which charter said defendant (plaintiff in error) through its Common Council is authorized to create, pave, repair and otherwise improve the highways, streets, avenues, lanes, alleys or interior public spaces created by the intersection of the streets, crosswalks and sidewalks in said city and also to construct and repair all sidewalks in said City *and the plaintiff avers that under its charter it is the duty of said defendant to keep and maintain its streets and sidewalks in good and sufficient repair so that all persons may pass and repass safely over the same.*" She then charges the disregard by the defendant below (the plaintiff in error) of its duty in this respect.

Record, p. 9.

In the second count the declaration contains the same allegations concerning the charter as in the first count, except that it omits the clauses "and also of constructing and repairing all sidewalks in said city" but it specifically charges, that the said walk on Church street, where the defendant in error was injured "is a sidewalk which

it is and at the time of the happening of the injury herein complained of and prior thereto, it was the duty of said defendant to maintain and repair as aforesaid."

Record, p. 10.

The third count of the declaration charges that the defendant (plaintiff in error) "had kept and maintained a public street or highway known as Church street * * * and has kept and maintained a sidewalk along the north side of said Church street." It then charges that it was the duty of the defendant to keep said sidewalk in good repair.

Record, p. 11.

Each count alleges the injury to the plaintiff by reason of the defective sidewalk while plaintiff was lawfully passing along said street in a prudent and careful manner and without any fault or negligence on her part and upon these portions of the declaration no question arises.

While the defendant in error (plaintiff below) was upon the witness stand, she said, that she had no feeling in the right side of her body and the following colloquy took place :

Mr. Canfield — May it please your honor, I would like to have the witness exhibit to the jury or demonstrate to the jury that she has lost all sensation as well as use of her arm.

Mr. Duffield -- To that I object.

The Court — I think she may show it.

Mr. Duffield — I will take an exception.

Mr. Canfield — Or if your honor will permit, I will call a doctor and let him do it.

The Court — I think you had better call a doctor.

Mr. Duffield — I take further objection to any further demonstration by the doctor.

The Court — I think the doctor may subject her to a test to show that she has no feeling.

To which ruling and decision the defendant, by its counsel, did then and there duly except.

Record, p. 39.

Dr. Gaylord, who was not sworn as a witness, then in open court with a pin which was first exhibited in view of the court and jury and of the defendant's counsel, and which said counsel might have inspected or examined, proceeded to apparently thrust it into the right side of the plaintiff's face, her right arm and leg. The plaintiff was not sworn to act naturally or to give true manifestation of her feelings, nor was she asked whether she felt the prick on one side and not on the other, but from her actions the jury would infer, that she felt great pain when pricked on the left side but did not feel it when pricked on the right side.

Record, p. 39.

The plaintiff also called one Moore as a witness who testified that he was a special policeman, employed by a private company, and in 1883 was at Trumbull avenue station. That "there is a portion of that triangular lot toward the intersection or junction of Michigan avenue and Church street that is vacant. That part of the sidewalk toward the intersection or junction of Michigan avenue and Church street was very bad, in bad condition, that is, from the rear of the station to the junction in 1883." This was not the place of the accident as

located by plaintiff and all her witnesses, and the defendant below moved, that so much of the testimony of the witness Moore as is given above, be stricken out, but the court overruled the objection and admitted the testimony and defendant excepted.

Record, p. 44.

Plaintiff also called in her behalf, as a witness, one Austin, who testified as follows:

Q. Did you notice the condition of the sidewalk on Church street, opposite the police station?

A. No, sir.

Mr. Duffield — Was this before or after the accident?

A. About a week after the accident.

Mr. Duffield — To that I object.

The Court — I think that is competent.

Q. What do you state in regard to that?

To which defendant, by its cousel, objected, and excepted to the overruling of his objection. Thereupon the witness answered:

A. I met Mr. Osborne on my way to dinner: I forget whether it was Sunday or week day; but, in speaking of the accident, I stepped off of Michigan avenue on to Church street and looked at the sidewalk and found that it had been recently repaired.

Record, p. 46.

The plaintiff, herself, testified, that at the time of the accident "I fell forward on my head, and I lay there, I do not know how long. I tried to get up, and could not. He picked me up and carried me to the station. The

blood gushed out of my nose. He left me there, and the policeman took charge of me, bathed my face, and put a plaster on my nose, and gave me something in a glass—I thought it was whisky—and I sat there quite a while, and I said I must go home. All my idea is to get home. I was feeling so shook up and bad. I got home at last. I do not recollect how I got home. It seemed as though I was dazed. Everything was in a cloud. My nose was cut badly, and my forehead was badly cut and terribly bruised. * * * When I got home I was feeling pretty badly, but thought if I rested and kept still the effects would work off, but instead of that I kept getting worse. I was very uneasy. I had a friend staying with me, and toward evening I got so uneasy I could not rest anywhere, and a tingling sensation in my right side, just as though ——— was running pins all in my right side. I did not understand it, and thought it was, of course, the fall and shook up. In the evening I was so bad, but being a stranger — then my husband wanted a particular doctor, in whom he had great faith — a friend of his — and he went to get him in the morning. It was Dr. Gaylord. He examined me thoroughly, and said that paralysis had set in."

Record, p. 38.

Subsequently, upon cross-examination, the plaintiff testified, "I think it was on Saturday that the accident happened to me. I think it was on Monday morning that Dr. Gaylord came to see me. From Saturday until Monday morning I had no physician."

Record, p. 40.

Dr. Gaylord testified that he was called to attend the plaintiff on the 19th day of November, 1883 (the acci-

dent was on the 17th November,) and found her with a bruised nose, quite badly cut, upon which there was a plaster, a bruised condition of her forehead, and black condition about her eye, and her right side showing evidence of having been badly shaken up. Found that she was blind in the right eye, and progressively deaf with her right ear, and after a very short time she lost the entire sensation of her right side.

Record, pp. 41, 42.

The defendant below called Dr. Gilmartin as a witness, who testified that he was a practicing physician, and had been for some twenty odd years. That he had examined the lady with Dr. Book and heard from Mrs. Osborne and the other witnesses the nature of the injury which she had sustained in falling on the sidewalk and having bruises. That in case of that kind of injury an immediate treatment is of material importance.

Defendant's counsel then asked this question:

"In accidents of the kind Mrs. Osborne suffered from, state whether or not a delay of forty-eight hours in receiving medical attendance would have any probable effect upon the case?"

Before the question was answered the Court interposed:

"The question would be, whether there was any negligence on her part in the delay; not whether the negligence itself was fatal."

And the witness answered:

"Well, it would be rather an unfavorable point. I do not think she should have taken so long, for her * * * * It was a possibility if she had had prompt treat-

ment that these consequences might have been averted. In a woman of Mrs. Osborne's fine physique * * * * I would have been very anxious to have given her the benefit of very active treatment * * * if that sort of treatment was delayed forty-eight hours it would scarcely have been of any use ordinarily" * *

Record. p. 52.

Q. Is it possible to say that these injuries might not have been avoided if such treatment had been had promptly and at once?

A. I really cannot answer that fairly.

Q. Then I suppose you do answer it?

A. In that sense. It is hard to say what peculiar change might have been brought about, even with active treatment.

Q. She might have been cured, might she?

A. It would seem that the conditions were favorable in her instance to relieve her greatly in her present horrible state.

Q. It is in testimony that previous to this accident she was quite a strong and vigorous woman, even unusually so; now with that fact in the case I repeat the question?

A. I should certainly have given her the benefit of her fine physical condition and interfered very actively in her behalf.

Q. And if that had been done, I repeat again the question, is it possible to say this might not have been effectual.

A. Well, no man knoweth; I do not think it would be possible actually and categorically to answer you on that point.

Q. Then you do answer it, if that treatment had been attempted at once, she might have recovered?

A. I do not think she might have absolutely recovered, but her condition would have been materially improved in the respect that she would not be suffering from this difficulty about her eye and the general symptoms of paralysis would be very much lessened.

Record, pp. 53, 54.

The plaintiff in error (defendant below) requested the Court to charge "that if the jury find that the alleged defective sidewalk was adjacent to and abutting the Police Station of the City of Detroit, in the custody and control of the Metropolitan Police Commissioners of the City of Detroit and their patrolmen and agents, then the plaintiff cannot recover in this case."

Record, p. 60.

Also "that if the jury believe the testimony of the plaintiff and of the witness Bateson, called on behalf of the plaintiff, then the plaintiff was guilty of contributory negligence and cannot recover in this case."

Record p. 60.

Also "that upon the testimony of the plaintiff herself, she allowed 48 hours, viz., from Saturday morning until Monday morning to pass without calling in any medical aid or assistance at the most critical period of her injuries, during which time it appears from the testimony of Dr. Gilmartin, that prompt and efficient treatment might have prevented all the more serious consequences of the injury from which she is now suffering and there is nothing in the testimony from which the jury can rightfully determine what might and what might not have been the

extent of the plaintiff's injury had she received prompt and proper treatment. Therefore the plaintiff cannot recover in this case damages for any permanent, or the consequent injuries, but only for the pain and suffering occasioned by the direct wounds of the fall."

Record, p. 60.

And also, "that inasmuch as under the testimony it clearly appears that the plaintiff's own neglect of her case in delaying to summon medical aid for a period of forty-eight hours after the injury, may have contributed in a great measure to the permanent injuries from which the plaintiff testified she is now suffering, and there are no data in the case from which the jury can rightfully determine what the plaintiff's injuries might have been had she received prompt and proper treatment, the plaintiff cannot recover in this action any damages based upon any permanent or progressive injuries to her constitution."

Record, p. 60.

All of these requests the Circuit Court severally refused to grant as prayed and to each and every one of said refusals the said defendant by its counsel excepted.

Record, p. 60.

In his charge to the jury the trial Judge said, "Mr. Bateson, the first witness says, * * * "that at the Michigan avenue end, which was a little to the eastward, as I understand, of where the accident occurred, and to the rear end of the Police Station to Michigan avenue, the sidewalk was in a very bad condition" * * * The testimony on behalf of the defence on that subject is,

that of Mr. Bendell, a policeman who says, that the walk just where the accident occurred was in fair condition, although, I believe he admits that the walk further east was not in good condition. Mr. Robertson, the janitor of the Police Station said * * * that the part of the walk in front of the Police Station, where the accident occurred was generally good and that at the east end to the rear of the station the walk was in bad condition" * * *

Record, p. 61.

"Mr. Moore testified, that the walk near Michigan avenue was bad. * * * I have not in my minutes anything in regard to the walk where the accident occurred, but further east than that he said that the walk was bad. Now, gentlemen, it is for you to say as to whether the walk was in such condition as to render the City liable for negligence in that connection."

Record, p. 62.

The Court also said "although the officers of the station admit themselves that the walk to the east of there, near the Michigan avenue end of the street had been in bad condition for some considerable time."

Record, p. 62.

Counsel for plaintiff in error (defendant below) excepted to so much of this charge as left it to the jury to consider the condition of the sidewalk elsewhere than at the place of the accident referring to the sidewalk abutting the lot at the rear of the station.

The court in its charge also said, "now then, the question is, if you shall find this walk was defective, whether that defect had existed so long as to render the city

chargeable with notice. In that connection I think you are entitled to consider the fact that the accident occurred in front of the police station and within sight of the officers, whose duty it was to have charge of the station and to take care of it and the testimony of Mr. Bateson, who says that the walk had been three months in bad condition so far as he knows it."

Record, p. 62.

To this portion of the charge the plaintiff in error also excepted.

The court also charged the jury, "the burden of proof is upon the city to satisfy you that she (the plaintiff below) was guilty of contributory negligence, and the claim is that, from her own testimony, it appears that the sidewalk was so openly and manifestly bad that she was chargeable with negligence in walking over it. Well, now, I charge you, as a matter of law, that if the sidewalk was so bad as to be manifest to a person approaching it or walking toward it, then she could not have made use of the sidewalk, but while I can conceive that a person might without any negligence on her part make use of a walk which the city might be chargeable with negligence in maintaining, and the question, for instance, if other parties not knowing it, they might not know the defect, or if for any reason the vision of the party was obstructed, or their attention was diverted to some other object of interest, they might pass over a defective sidewalk without being guilty of what the law calls contributory negligence, and it is for you to say, gentlemen, under all the circumstances of this case whether the plain-

tiff was guilty of contributory negligence in passing over the walk at this point.

Record, pp. 62 and 63.

To this portion of the charge of the Court, the plaintiff in error excepted.

The Court also charged the jury after describing the injury from the accident as follows: "On reaching home, she supposed that she was not seriously injured and was able for some time to go about the house. And it would seem from the testimony, that progressive paralysis set in very soon after her fall and has continued from that time to the present. That for some time after that she was able to work and do her household duties, but that the paralysis gradually increased in intensity and has resulted in total disability. * * * You must be satisfied that she is beyond the probability of any recovery and if you are satisfied with that, then you may give her damages not only for the pain and suffering up to this time, but for what she will endure in the future. The defence to this part of the case is, that the plaintiff in this case did not send for a physician as soon as she should have done. The accident occurred on Friday, as I understand, or Saturday morning, and she did not send for a physician until Monday, although she was in pain from the time that she received the injury. Now in that connection I charge you, that * * * she is not, however, necessarily debarred from recovering for the whole extent of her injuries by reason of her not sending for a physician on Saturday, it is only in case you should find that she was negligent in sending for a physician on Saturday that she would be debarred from recovery.

Now sometimes a person, as I have remarked to counsel in the progress of the trial, will receive a very slight injury apparently, and yet it may turn out to be a very serious injury, and the injury may at first be so slight that he does not feel as though he would be authorized to call in the aid of a physician, and yet in the course of time more serious symptoms may start in and the injury may prove to be even a fatal one, as for instance, suppose a person were to scratch himself with a knife and blood poisoning was to set in after two or three days, I should hardly say that the mere fact that a person scratches himself with a knife would render it negligence on his part not to call a physician immediately. Scarcely any person would do that with a mere scratch with a knife and yet the scratch of a knife might prove, if the knife happened to be poisoned, to result in blood poisoning or in lock jaw or in some fatal disease. Well, now if the injury was so trivial as not to call upon a reasonable person to call a physician immediately, why then the fact that she did not call a physician at once would not bar or preclude her from recovering the whole damage for the whole injury which afterwards the accident may be shown to have resulted in."

Record, pp. 64 and 65.

To which instruction to the jury the plaintiff in error (the defendant below) duly excepted. The Court also instructed the jury, "now supposing you find, gentlemen, that the sidewalk was defective, and that the city was chargeable with notice with negligence in failing to repair it, and the plaintiff was not guilty of contributory negligence, then she should be entitled to recover, and

the remaining question would be as to the damages she suffered."

The jury returned a verdict for the plaintiff for ten thousand dollars and judgment was entered thereon.

SPECIFICATION OF ERRORS.

The plaintiff in error asserts the following errors which it intends to urge.

First — The Court erred in refusing to charge the jury as prayed by the plaintiff in error in its third request, "that if the jury find that the alleged defective sidewalk was adjoining to and abutting a police station of the city of Detroit, in the custody and control of the metropolitan police commissioners of the city of Detroit and their patrolmen and agents, then the plaintiff cannot recover in this case." (Record page 60.)

Secondly — The Court erred in instructing the jury. "Now, supposing you find gentlemen that the sidewalk was defective and that the city was chargeable with notice, with negligence in failing to repair it, and the plaintiff was not guilty of contributory negligence, then she should be entitled to recover, and the remaining question would be as to the damages she suffered." No exception was taken to this portion of the charge on the trial but the plaintiff in error assigns error upon it under the provisions of the following act of the legislature of the State of Michigan.

"* * * It shall not be necessary in any suit, action or proceeding, civil or criminal, in any circuit court, to

except to the charge given to the jury, but any party aggrieved by any such charge may assign errors upon such charge, in his assignment of errors, the same as if exception had been made to such charge."

Act No. 101, Public Acts of Michigan, 1885, p. 104.

Thirdly — The Court erred in instructing the jury that they were "entitled to consider the fact that the accident occurred in front of the police station and in sight of the officers whose duty it was to have charge of the station to take care of it." (Record, p. 62.)

Fourthly — The Court erred in permitting Dr. Gaylord against the objection and exception of plaintiff in error to "subject the plaintiff to a test to show that she had no feeling," detailed on page 39 of the record as follows: "Dr. Gaylord, who was not then but was subsequently sworn as a witness, then, in open court, with a pin, which was first exhibited in view of the court and jury and of defendant's counsel, and which said counsel might have inspected or examined, proceeded to thrust it into the right side of the plaintiff's face, her right arm and leg. The witness was not sworn to act naturally or to give true manifestations of her feelings, nor was asked whether she felt the pricking on one side and did not feel it on the other, but from her actions the jury would naturally infer that she felt great pain when she was pricked on the left side and did not feel it when pricked on the right side.

Fifthly — The Court erred in admitting the following testimony of the witness Moore, "there is a portion of that triangular lot toward the intersection or junction of Michigan avenue and Church street that is vacant. That

part of the sidewalk toward the intersection or junction of Michigan avenue and Church street was very bad — in bad condition (that is, from the rear of the station to the junction) in 1883." (Record, p. 44.)

Sixthly — The Court erred in calling attention in his charge to the testimony of the witness Moore, above quoted, and of the other witnesses, Bateson and Bendell. (Record, pp. 61 and 62.)

Seventhly — The Court erred in admitting, against the objection and exception of the plaintiff in error, the following testimony of the witness Austin: "I met Mr. Osborne on my way to dinner. I forget whether it was Sunday or week day, and, in speaking of the accident, I stepped off Michigan avenue on Church street and looked at the sidewalk and found it had been recently repaired." (Record, p. 46.)

Eighthly — The Court erred in refusing to instruct the jury, as prayed by the plaintiff in error, in its fourth request, "that if the jury believed the testimony of the plaintiff and of the witness Bateson, called in behalf of the plaintiff, then the plaintiff was guilty of contributory negligence, and cannot recover in this case."

Ninthly — The Court erred in refusing to instruct the jury as prayed by the plaintiff in error in its fifth request. "That upon the plaintiff's own testimony she is guilty of contributory negligence and cannot recover in this case."

Tenthly — The Court erred in instructing the jury as follows: "Well, now, I charge you as a matter of law, that if the sidewalk was so bad as to be manifest to a person approaching it or walking toward it * * * then she should not have made use of the sidewalk, but

still I can conceive that a person might, without any negligence upon her part, make use of a walk which the city might be chargeable with negligence in maintaining and the question for instance, if other parties not knowing it, they might not know the defect, or if for any reason the vision of the party was obstructed, or their attention was diverted to some other object of interest, they might pass over a defective sidewalk without being guilty of what the law calls contributory negligence. (Record, p. 63.)

Eleventhly — The court erred in instructing the jury, "The burden of proof is upon the city to satisfy you that she (the plaintiff) was guilty of contributory negligence." (Record, p. 62.)

Twelfthly — The Court erred in instructing the jury: "You are entitled to consider in this connection the fact that the immediate cause of the injury was not her stepping on the plank, but the fact that Mr. Bateson stepped on the plank, and for his negligence which contributed to the injury she would not be responsible. For the testimony would indicate it shows conclusively, I think, the injury to her was caused by Mr. Bateson stepping upon this plank and raising it suddenly in front of her." (Record, p. 63.)

Thirteenthly — The Court erred in refusing to instruct the jury as prayed by the plaintiff in error in its sixth request: "That upon the testimony of the plaintiff herself she allowed forty-eight hours, namely, from Saturday morning until Monday morning to pass without calling in any medical aid or assistance at the most critical period of her injuries, during which time it appears from the

testimony of Dr. Gilmartin that prompt and efficient treatment might have prevented all the more serious consequences of the injury from which she is now suffering, and there is nothing in the testimony from which the jury can rightfully determine what might or what might not have been the extent of the plaintiff's injuries had she received prompt and proper treatment.

Therefore the plaintiff cannot recover in this case damages for any permanent or consequent injuries, but only for the pain and suffering occasioned by the direct wounds of the fall. (Record, p. 60.)

Fourteenthly — The Court erred in refusing to instruct the jury as prayed by the plaintiff in error in its seventh request:

"That inasmuch as under the testimony it clearly appears that the plaintiff's own neglect of her case in delaying to summon medical aid for a period of forty-eight hours after the injury, may have contributed in a great measure to the permanent injuries from which the plaintiff testifies she is now suffering. And there are no data in the case from which the jury can rightfully determine what the plaintiff's injuries would have been had she received prompt and proper treatment. The plaintiff cannot recover in this action any damages based upon any permanent or progressive injuries to her constitution." (Record, p. 60.)

Fifteenthly — The Court erred in instructing the jury, "Now, sometimes a person, as I have remarked to counsel in the progress of the trial—a person will receive a very slight injury apparently, and yet it will turn out to be a very serious injury, and the injury may at first be

so slight that he does not feel as though he would be authorized to call in the aid of a physician and yet in the course of time more serious symptoms may set in and the injury may prove to be even a fatal one—as for instance, suppose a person was to scratch himself with a knife and blood poisoning would set in after two or three days, I would hardly say that the mere fact that a person scratches himself with a knife would render it negligence upon his part not to call a physician immediately—scarcely any person would do that, with a mere scratch of a knife and yet the scratch of the knife may prove, if the knife happens to be poisoned, to result in blood poisoning or in lock-jaw, or in some fatal disease. Well, now, if the injury was so trivial as not to cause a reasonable person to call upon a physician immediately, why then the fact that she did not call a physician at once would not bar or preclude her from recovering the whole damage for the whole injury which afterwards the accident may be shown to have resulted in."

BRIEF.

I.

To the claim of the plaintiff below, the defendant set up as a defence that there was no liability on the part of the city on account of the defective condition of the sidewalk, and requested the Court to charge the jury "that if the jury find that the alleged defective sidewalk was adjoining to and abutting a police station of the City of Detroit, in the custody and control of the Metropolitan Police Commissioners of the City of Detroit, and

their patrolmen and agents, then the plaintiff cannot recover in this case."

Record, p. 60.

The Court refused to give the charge, as prayed, and also instructed the jury, "Now, supposing you find, gentlemen, that the sidewalk was defective and that the city was chargeable with notice, with negligence in failing to repair it, and the plaintiff was not guilty of contributory negligence, then she would be entitled to recover, and the remaining question would be as to the damage she suffered."

Record, p. 63.

And also instructed the jury that they "were entitled to consider the fact that the accident occurred in front of the police station, and in sight of the officers, whose duty it was to have charge of the station, to take care of it."

Record, p. 62.

It was conceded, that the sidewalk on which the accident occurred was adjoining and abutting a police station occupied by the Metropolitan Police of the City of Detroit. It must also be conceded by counsel, that under the provisions of the Charter of the City of Detroit above quoted, and the laws of the State of Michigan, as construed by the Supreme Court of the State, the City was not liable in this case. The plaintiff moved out of the State for this very reason. Such has been the law as settled by the Court of last resort of said State since 1871. The leading cases are:

Detroit vs. Blakely, 21 Mich. Rep., 84.
Detroit vs. Putnam, 45 Mich., 263.
Church vs. The City of Detroit, 64 Mich., 571.

In substance, they hold that municipal corporations, in respect to their governmental functions are not answerable in damages to individuals, but only to the people on indictment or information, and that actions of this class are based upon *non-feasance* of a municipal governmental duty by the defendant.

In the case of

Detroit vs. Blakeby, 21 Mich., R. p. 84,

the Court speaking by Campbell Ch. J., said:

"Charters to municipal corporations in the State of Michigan are not contracts * * * They create governmental agencies."

"Municipal officers are in no such sense municipal agents, that their negligence is the neglect of the municipality; nor will their misconduct be chargeable against it. * * * The streets of Detroit are public highways like all other roads; the duty of keeping them in repair is a duty to the public, not to private individuals, the mere neglect of which is a non-feasance only, and for an injury resulting from such neglect no action lies."

Subsequent to this decision, the Legislature of the State of Michigan, in 1879, passed an Act (Howell's Annotated Statutes of Michigan, Vol. 1, p. 418, Sec. 1442) providing, among other things, that "any person or persons sustaining bodily injury upon any of the public highways or streets in this State by reason of neglect to keep such public highways or streets, and all bridges, crosswalks and culverts on the same in good repair, and in a condition reasonably safe and fit for travel, by the township, village, city or corporation whose corporate authority extends over such public highway, street,

bridge, crosswalk or culvert and whose duty it is to keep the same in good repair, such township, village, city or corporation shall be liable to, and shall pay to the person or persons so injured or disabled, just damages, to be recovered in an action of trespass on the case before any Court of competent jurisdiction."

This statute remained in force up to the date of the accident, and the recovery of the judgment, to reverse which, the writ of error is brought.

It was construed by the Supreme Court of the State of Michigan in the case of

Detroit vs. Putnam, 45 Mich. R. p. 263,

not to create a municipal liability for injuries caused by defective sidewalks.

The ground of the decision was that the special terms used, (to-wit, bridges, crosswalks and culverts), did not enlarge, but limited the force of the general words used.

Subsequent to this decision, and on the 17th day of June, 1885, the Legislature attempted to repeal the section above quoted, and to include in the liability of cities, townships and villages, negligence in the care of sidewalks. But the Supreme Court of the State of Michigan, in the case of

Church vs. City of Detroit, 31 North West. R., p. 447,

decided that this act was unconstitutional for reasons stated in the opinion. The liability, if any, therefore, of the plaintiff in error, at the time of the alleged accident, and at the time of trial, depended upon the charter powers of the plaintiff in error as a municipality, and the duties arising thereon.

The plaintiff in error contends, that under these decisions the construction of the law by the State Courts has been so settled that the Federal Courts will accept it as binding upon them. The learned Judge who tried the cause below held the city liable, but he has since the writ of error in this case and the decision of this Court in the case of Bucher vs. Cheshire Railroad Company, 125 U. S., p. 555, declined to enter any judgments upon verdicts against the city of Detroit until this Honorable Court has passed upon the question.

I start with the proposition, that there is no common law duty resting upon any municipality to repair or keep and maintain in repair its sidewalks.

Such a duty exists only by force of some provision in the municipal charter or general laws of the state.

The Supreme Court of Michigan has held that the Common Council of the City of Detroit were not compelled to leave any space for sidewalks, but might lawfully pave the entire street from lot line to lot line as a roadway.

Detroit vs. Brevoort, 24, Mich., 322.

The only ground of liability upon which municipalities are held in sidewalk cases is either because the power is given to a city by its charter to repair its streets and keep and maintain its public streets and sidewalks in a reasonable safe condition for travel, or because some general law of the state imposes that duty upon municipalities throughout the state. In the very recent case of Cleveland vs. King, 132, U. S., 295, this court, speaking through Mr. Justice Harlan, placed the ground of liability upon the revised statutes of Ohio concerning municipal

corporations. In the City of Providence vs. Clapp, 17 How., 161 (see p. 167,) this court, speaking through Mr. Justice Nelson, said: "It is admitted that the defendant's *are not liable for the injury complained of at common law, but that the plaintiff must bring his case within the statute* to sustain the action."

It would seem to follow of necessity that if neither by the charter of the city, nor the statutes of the state, as construed by the courts of that state, there was any liability on the part of the city, the federal courts should follow these decisions. I do not overlook the fact that this court has very considerably modified the rule as first understood by the profession regarding the conclusive effect upon the federal courts of the decisions of the state courts construing state statutes, but I do not understand that a case like the present one falls within any of the exceptions.

On the contrary, I do understand from the decisions that where, as in the present case, the statute concerns local affairs and its construction has been settled by repeated decisions covering a long period of time, that this court will not disregard the state courts' decisions, even though it does not agree with their reasoning.

In Burgess vs. Seligman, 107, U. S., 20, the Court said, p. 33: "Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions, certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true of the law of real estate and the construction of state constitutions and statutes. Such established rules

are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative decisions of what the law is."

In Claiborne County vs. Brooks, 111, U. S., 401, this Court speaking through Justice Bradley, said, p. 410 : "It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question which relates to the internal constitution of the body politic of the State.

In Bucher vs. Cheshire Railroad Company, 125 U. S. 555, the decision of this honorable court fully sustains the present contention of the plaintiff in error. It is expressly held in that case that the construction by the Supreme Court of Massachusetts of the Lord's Day Act of that state was binding upon this Court. The Court speaking through Mr. Justice Miller said, "It may be said generally that wherever the decisions of the State Court relate to some law of a local character which may have become established by those courts or has always been a part of the law of the state that the decisions upon the subject are usually conclusive * * * * Where such law or custom has been established by repeated decisions by the higher courts of a state, it becomes also the law governing the courts of the United States citing Burgess vs. Seligman 107, U. S., p. 20.

It seems to me that this Court will hesitate to lay down the proposition that the State Courts shall not be final judges of the liability of municipal corporations in

local affairs under the statutes of their State. It is certainly a subject peculiarly within the reasoning of the decisions of the Federal Court, which hold that the construction of the local laws of the State by the State Court are conclusive upon the Federal Courts.

Christy vs. Pridgeon 4 Wall., 196.
Claiborne County vs. Brooks, 111 U. S., 400.
Smith vs. Kernochen, 7 How., 198.
Luther vs. Borden, 7 How., 1.
Gelpcke vs. Dubuque, 1 Wall., 175.
Randall vs. Brigham, 7 Wall, 523.
Township of Elmwood vs. Marcy, 92 U. S., 289.
Township of Ottawa vs. Perkins, 94 U. S., 260.
Fairfield vs. Gallatin Co., 100 U. S., 47.
Post vs. Supervisors, 105 U. S., 667.

The unfairness that will result, and has resulted in the State of Michigan from allowing a liability on the part of the city in favor of a non-resident, which is denied to the resident and tax-payer is manifest. For a number of years in the State of Michigan under the rulings of the local federal courts, the judge of the court could not recover for injuries arising from the defective sidewalk, while the transient visitor or traveler could recover. The mayor of a city or the largest tax-payer of a city, if a resident, cannot recover for an injury from a defective sidewalk because he must sue in the State Court, while any tramp, who by reason of his non-residence, can bring suit in the Federal Court can recover. It would seem to be manifest injustice to deny the right of action for such an injury to a person who contributed, through payment of his taxes, the moneys necessary to keep the sidewalks in repair and yet allow the non-resident who does not contribute anything whatever to the support of the city government or

the care of the streets to recover. In the present case the plaintiff, after the injury occurred, moved out of the State of Michigan and became or pretended to become a citizen of Ohio in order that she might assert in the United States courts a right of action which was not allowed to her by the State Courts. She was born in the City of Detroit and had lived under its laws and enjoyed its privileges. She was presumed to know the laws of the State. If her recovery in this case is sustained because she had moved out of the State and changed her citizenship after her injury, it will well illustrate the injustice of the rule.

But upon another ground the third request of plaintiff in error should have been given.

The act creating the Board of Metropolitan Police Commissioners for the City of Detroit contains the following provisions. They are the only ones material to the question raised here.

An act to establish a Police Government for the City Detroit, as amended by the act of April 17, 1871, of the Public Acts of Michigan.

Laws of Michigan, 1871, No. 479, Vol. III., p. 230.

Section 1.— The People of the State of Michigan enact, That all powers and duties connected with and incident to the Police government and discipline of the City of Detroit shall be, as hereinafter more especially provided, vested in and exercised by a Board of Metropolitan Police, composed of four Commissioners of Metropolitan Police, and by a Superintendent of Metropolitan Police, one or more Captains of Metropolitan Police, Sergeants of Metropolitan Police, and Patrolmen

of Metropolitan Police. A majority of said Board shall constitute a quorum for the transaction of business.

SEC. 3. The term of office of each Commissioner of Metropolitan Police, after the respective determinations of the terms aforesaid, shall be eight years, and the Governor shall nominate, and by and with the advice and consent of the Senate, shall appoint from the citizens of Detroit, who shall be freeholders, a successor to the person whose term shall be about to expire as such Commissioner. Any vacancy occurring during the term of any Commissioner shall be filled by appointment of the Governor, and the Commissioner so appointed shall continue in office until his successor shall be appointed in manner aforesaid.

Ibid, p. 231.

SEC. 7. Said Board shall assume and exercise the entire control of the Police force of said City, and shall possess full power and authority over the Police organization, government, appointments and discipline within said city. It shall have the custody and control of all public property, books, records and equipments belonging to the Police Department, and shall have power to erect and maintain all such lines of telegraph in such places within said city, as for purposes of police the Board shall deem necessary, whenever the Common Council shall authorize the establishment of such telegraph line or lines, and provide for the cost thereof.

Ibid, p. 233.

SEC. 13. The members of the police force of the City of Detroit shall possess all the common law and statutory powers of constables, except for the service of civil

process. * * * *

Ibid, p. 238.

SEC. 22. It shall be the duty of the board of police to prepare and submit to the controller, on or before the first day of March in each (every) year, an estimate of the whole cost and expense of providing for and maintaining the police department of said city during the ensuing fiscal year, which estimate shall be in detail, and shall be laid by the Controller before the Common Council with his annual estimate, and the same shall be by the Common Council of said city, submitted to the City Council of said city, and so much thereof as shall be approved shall be provided for in the general tax assessment, by levy to be laid on said city, and collected with other city taxes; and said money shall be paid by the Receiver and Collector of Taxes to the Treasurer of said city, who shall once a week or oftener, pay the same to the Treasurer of the Board of Metropolitan Police. The money so collected shall constitute and be styled "The Metropolitan Police Fund." The said Board of Police shall appoint a Treasurer, who shall be the custodian of the money of said fund, and deposit the same in such place, and in no other, as he shall be directed by the Board. He shall give security to said Board that he will keep said money in said place and in no other; that he will pay the same upon the order of said Board, and in all respects account for the disposition of the same; and that he will perform faithfully the duties of Treasurer. Said Treasurer shall be appointed to serve during during the discretion of the Board. (As amended March 14, 1882.)

Ibid, p. 245.

These sections expressly confer upon the Board not only all police powers, but the care, possession and control of all property used in its department. And to such extent that Section 22 provides for the raising of the necessary monies upon an estimate of the Police Department, not of the City Controller as is the case with other funds, and such funds when raised, go into the treasury of the Metropolitan Police, and do not remain in the City Treasury. The Board is appointed by the Governor of the State without nomination to or confirmation by the City government. It owes no obedience or allegiance to the City of Detroit, and is in no wise subject to its authority.

That said Board of Police Commissioners is a state and not a municipal agent, was expressly held by the Supreme Court of Michigan in the

People vs. Hurlburt, 24 Mich., 31.

The Court speaking through Judge Campbell said expressly, "I think it (the police force) is clearly an agent of the state government and not of the municipality."

It has also been held by the Supreme Court of the State of Michigan, that the Police Commissioners are not officers or agents of the city and that the patrolmen of the police force are not officers or agents of the city.

People vs. Mahaney, 13 Mich., 481.
Detroit vs. Laughna, 34 Mich., 402.

These decisions are constructions of the local statute of the state, by the highest court of the state, and will be followed by this court.

I submit therefore that on this latter ground the request should have been given as prayed. The city of

Detroit can be held liable to keep only such sidewalks in repair (except those around public parks and buildings, and the intersection of cross-streets), as it has the power to compel the adjoining lot owners to rebuild or repair. Take as an illustration the case of a federal building in a city. The city can exercise no authority over it and can levy no valid assessment upon it.

In the city of Detroit this has been a uniform rule of the Treasury department of the United States and its correctness has never been questioned. Now, suppose the plaintiff in this case had been injured by a defective sidewalk in front of the postoffice of the city of Detroit, standing upon United States territory, jurisdiction over which had been ceded by the State to the federal government, and possessing absolute immunity from State or federal taxation or assessment, could it be contended for a moment that the city of Detroit was liable or could be held responsible for the neglect to repair the sidewalk? At the time of the trial of this very case the city of Detroit had previously laid a stone sidewalk along Jefferson avenue, in front of the United States Marine Hospital, and the expense of laying the same had remained unpaid, although the cost thereof had twice been favorably reported by the Secretary of the Treasury in his recommendations to Congress for annual appropriations, but each time was stricken out of the bill in the House of Representatives.

In the case of Margaret Rice vs. the City of Detroit Circuit Judge Baxter and District Judge Brown held that the city was not liable where an accident had occurred through the accumulation of snow and ice within the twenty-four hours in which the lot owners are allowed

by the ordinance to remove the same and before the city could act directly through its own agencies for the removal of the ice and snow. The principle of this decision applies to the case at bar, and the present case is stronger than the one cited.

It certainly must be held that the city is not legally liable for anything which it cannot legally prevent. If it cannot legally compel the Board of Police Commissioners to repair their sidewalks adjoining their premises and make the expenses thereof a valid lien upon its property, according to its charter, then it cannot be held liable for any accident that may happen from the defective condition of such sidewalk. Suppose the building in question had been the Capitol of the State, located in the City of Detroit, and there was no fund which could be raised under the charter of the City of Detroit for the construction of sidewalks, except along the public parks and spaces and intersection of streets and city property. Could the city compel the State to repair its sidewalks, and if it could not, could the plaintiff recover against the city for neglect of any duty in the premises.

The Court not only refused to give the instruction prayed, but in addition, the court, *sua sponte*, called the attention of the jury to, and directed them to consider the fact that the accident occurred in front of the police station, and within sight of the officers, whose duty it was (the Court said), to have charge of the station.

Record, p. 62.

It is settled law that a city or state is not liable for the negligent performance of duty by its police officers. As well might the court call the jury's attention to the fact

that a murder was committed in front of a police station, as tending to make the city liable.

The report of a defective sidewalk *to a policeman* is not evidence of express notice to the city. Yet such a charge would be proper if the one given by the court in this case is.

Little vs. City of Madison, 49 Wis. R., 605.
Schultz vs. City of Milwaukee, 49 Wis. R., 254.
35 Ann Repts., 793.

II.

The Court below erred in permitting the experiments by Dr. Gaylord upon the plaintiff.

The doctor had not been sworn as a witness nor had the plaintiff been sworn (or could be in any other way than by the ordinary oath of the witness to tell the truth). The court permitted the doctor, who was the plaintiff's family physician, to apparently press a pin into her face and arm and legs on both sides of her body. When this was done on her right side she gave no appearance of being hurt, but when it was done on her left side she made manifestations of great pain. The counsel for the plaintiff in error (the defendant below), objected to this being permitted, and excepted to the ruling of the court allowing the same.

Fourth Assignment of Error.

I submit First — That this exhibition had in it not one element of sworn testimony or sworn evidence, as the doctor was not sworn to fairly test the plaintiff, nor was he sworn as to the instrument he was using.

Secondly — The instrument used was neither shown to the jury nor to the defendant's counsel.

Thirdly — The plaintiff was not sworn to behave naturally while she was experimented upon.

Fourthly — She was not asked so as to give a sworn answer, whether the pin hurt her on her left side and did not hurt her on her right side. It is easy to see how such a practice might be abused. It is quite evident that the opposite party in such cases has no means whatever of testing the fairness of the experiment or of the manifestations. It is quite possible that the doctor and plaintiff may have wholly deceived the Court and jury, yet even if such could be shown to be the fact, neither of them would be liable for perjury or for giving false testimony. Thus, while there is not an iota of sworn testimony in the whole performance, the plaintiff has the benefit of an exhibition strongly calculated to influence the jury. It would be possible under this ruling to practice great impositions on a court and jury, and the practice if once established might, in cases of personal injury, turn the court room into a legerdemain show. The fact that the experiment was made by a physician, does not avoid the objection but rather adds force to it. It certainly requires no professional skill to stick a pin into another person and I see no reason, if the plaintiff's physician is to be allowed to do so, why the plaintiff's attorney or friend ought not to be allowed to do so. Yet I think that such a proposition would startle any lawyer. The learned Judge in over-ruling this ground of the motion for a new trial in reply to the objection, that this evidence (if it may be so called) was unsworn says, "We know, however, of no oath which could be administered to the doctor or the witness touching this exhibition. So far as we are aware the law recognizes no oaths to be

administered upon the witness except the ordinary oath to tell the truth or to interpret correctly from one language to another," and yet a sentence or so below, he says, "there was nothing which tended to show trickery on the part of the doctor, nor was there any cross-examination demanded from the witness upon this point.,'

Record. p. 21.

He then argues that it is competent for the plaintiff to appear before the jury and if she had lost an arm or a leg by reason of the accident, they could hardly fail to notice it. By parity of reasoning it would seem, that she was at liberty to exhibit her wounds if she chooses to do so, as is frequently the case where an ankle has been sprained or fractured. a wrist fractured or any maiming has occurred."

I submit that the case at bar has a new element in it and is entirely different from the illustrations used by the learned judge. The plaintiff might be entitled to exhibit to the jury any permanent physical deprivation or disfigurement which remained as the result of the injury. The point of the objection is not on this ground, nor was this what she did. The jury did not see any part of her person except her face, and the experiment with a pin upon the arms and limbs was not made after her clothing had been removed. There was nothing which the jury could see in the exhibition except the conduct of the plaintiff during it. The Judge also says "that there was not the slightest evidence offered by the defendant that the plaintiff was not completely paralyzed," entirely losing sight of the very positive testimony of Mrs. Teagan, a neighbor and friend of the plaintiff who

estified that a couple of months after the accident she visited Mrs. Osborne. "When I went in she was sitting by the window on a chair. I stayed about half an hour. She got out of her chair, she said she had some occasion to go into the other room to see about water in the kettle. She went into the kitchen, that was an adjoining room. She got up from her chair and walked quite fast across the floor * * * She went into the kitchen and came out again and sat on the chair. I did not assist her neither, nor anybody else. She did not have any crutch or cane."

Record, p. 57.

When Mrs. Teagan told the plaintiff that she did not see the use of plaintiff's having two physicians, she says the plaintiff said, "*You know Mrs. Teagan it is the doctors who will make a case of it, it is no use of me to be talking.*"

Record, p. 58.

Plaintiff had previously spoken to Mrs. Teagan about having a claim against the city for getting hurt on the sidewalk.

This was evidence upon which defendant could argue to the jury that the paralysis was feigned.

It cannot be contended that this performance if not admissible did not tend to prejudice the defendant in this regard.

One of the well established grounds for setting aside a verdict, is that the jury were carried away either by their passions or sympathy. One cannot conceive of a much better way to excite the sympathy of the jury

than by the manipulation by the physician to make an exhibition of the helplessness of the plaintiff as part of her case before the jury.

Was not that the sole reason for doing it? Plaintiff's counsel was not satisfied with oral and ordinary testimony. He must add to it an exhibition—a sort of little drama in the witness box. Why does he do it? Not to establish any fact which he has not already given evidence upon, but for its effect as a show—to enlist the sympathy of the jury and play upon their feelings.

But if this is admissible, then the trial of the plaintiff's insensibility by the defendant must be admissible. The defendant's attorney or a physician employed by him should have the right to try his hand, and stick pins and awls into the plaintiff. The unseemly results of such performances in a court room suggest themselves at once.

III.

The proof showed that the police station occupied but a portion of the triangular lot formed by the intersection of Michigan avenue and Church street, and that for a distance of twenty-five or thirty feet from the point of intersection, and in the rear of the station house, there was a vacant lot which was not occupied by the police station. It was not fenced and was not in charge of the police.

Record, p. 55.

Against the objection of defendant's counsel, the court permitted testimony to be given as to the condition of this part of the walk, by Robert J. Moore.

Record, p. 44.

And the trial judge, in his charge, specially called the attention of the jury to this testimony.

Record, pp. 61, 62.
Fifth and Sixth Assignments of Error, Ante. p. 19, 20.

The testimony was inadmissable, and it was error to instruct the jury to consider it. It had no tendency to prove the condition of the walk where the plaintiff fell. If the city was liable at all, it was for its neglect in failing to repair the walk where the plaintiff fell. There is no authority to admit evidence of the condition of the sidewalk in front of another lot.

This point is so decided by the Supreme Court of Michigan in McCool vs. Grand Rapids, 58 Mich., Rec., p. 46, and the Court of Appeals of New York has held "that other defects in the street than that which caused the injury, cannot be shown unless it is also shown that the injury from the defect in question necessarily followed in consequence of the other defects."

See also Ring vs. Cohoes. 77 N. Y., p. 83.

IV.

The court permitted the witness Austin to testify to the condition in which the walk was a week after the accident.

Seventh Assignment of Error, ante p. 20.

He testified that the walk had recently been repaired.

Record p. 46.

He knew nothing whatever about the accident, or where it happened, or whether the repairs to which he

testified were at the place of the accident. This was error.

Record, p. 47.
Ruggles vs. Town of Nevada, 18, Northwestern, R., 866

V.

The Court refused to give the defendant's fourth and fifth requests that upon her own testimony and the testimony of herself and Bateson, the plaintiff was guilty of contributory negligence.

Eighth and Ninth Assignments of Error, ante p. 20.

Her testimony is that "she was not looking much."

Record, p. 38.

Bateson's testimony, "no one could step on it without tripping up, not even a child."

Record, p. 35.

"The planks were loose and rotted clear through. I hould think it was apparent to any observer passing along there, as there was a large hole any one could see. Any one who looked at it could see it. They could see that it was rotted away. It was a notoriously rotten condition of the plank."

Record, p. 36.

It appears that plaintiff walked along this walk onto which she turned from Michigan avenue without looking.

The walk was notoriously rotten so any one could see through to the dirt. A child could not step on without tripping, Bateson says. Yet plaintiff walks over it without looking even, and then asks $10,000 damages because she has been hurt.

If this had been at night or on a stormy day, or if there had been any sort of excuse for her not looking, the case would be different, but it is in the day time, clear, bright, fair weather, between 9 and 10 o'clock in the forenoon. Plaintiff walks deliberately onto this dangerous walk "without looking," as she says herself. If it had been a hole ten feet deep she would have fallen into it. Would the Court have then held that she was not guilty of contributory negligence?

It is the plaintiff's own statement of her case. As said by the Supreme Court of Michigan in

D. & M. R. R. vs. Steinberg, 7 Mich. R., p. 99.

"We must look at the case as it appears from plaintiff's own testimony. He had a right to ask the jury to believe the case as he presented it. * * * For the purposes of any positive instruction which one party may demand upon the evidence he must concede all that his opponent may claim from it."—pp. 117-118.

And in Davis vs. D. & M. R. R., 20 Mich. R., p. 106.

"When the plaintiff on the stand as a witness states his case so as to show that he has no cause of action, he has no ground of complaint, if the Court charged the jury that no recovery is justifiable."

Moore says the dangerous condition of the walk could be seen from Michigan avenue, that would be apparent to any person walking along there and taking usual care.

Record, p. 45.

But the plaintiff went right along over it without looking, and suffered from her own lack of care.

If this is not a case of contributory negligence, it can never be established except by proving prior knowledge on the part of the plaintiff.

The cases of

Scofield vs. St. Paul R'y Co., 114 U. S., p. 615.
Railroad Co. vs. Houston, 95 U. S., 697.

sustain the position of plaintiff in error.

In the latter case the Court speaking through Mr. Justice Field, said: "Had she (the plaintiff) used her senses she could not have failed to both hear and see the train which was coming. If she omitted to use them and walked thoughtlessly on the track she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of them." So in the case at bar, if the plaintiff had used her senses she could not have failed to see this "palpably dangerous," notoriously unsafe sidewalk, and failing to use them she walked thoughtlessly upon it.

In this connection the instruction of the Court to the jury suggesting to them the hypothesis of obstructed vision was erroneous.

Record, p. 63.
Tenth Assignment of Error. Ante p. 20.

Plaintiff in her testimony did not claim any such thing.

VI.

The Court erred in charging the jury that the burden of proof of establishing contributory negligence was upon the defendant.

Eleventh Assignment of Error, Ante p. 21.

In the case of an action founded upon the duty of a corporation to the public, no right of action exists in favor of an individual unless he is himself not in fault, and he must show this.

Hayes vs. Michigan Central R. R., 111 U. S., p. 228.

In the case of the Railroad Company vs. Gladmon, 15 Wall., 401, it is held by the Supreme Court of the United States that, "Irrespective of statute law on the subject, the burden of proof of circumstances which convict the plaintiff of concurring negligence" does not rest upon the plaintiff. But in Hayes vs. Michigan Central R. R. Co., 111 U. S., 228, it is expressly held, that to maintain an action against a railroad company for neglect of a duty lawfully prescribed by a municipal corporation, the plaintiff must establish that the accident was reasonably connected with the want of precaution as a cause, and that he was not guilty of contributory negligence.

And the instruction of the Court in this connection that the jury might consider the fact that Mr. Batesons stepping on the plank was what caused the accident. (Record, p. 62, Twelfth Assignment of Error, Ante p. 21) could only have misled them on the question of contributory negligence.

Its necessary effect upon their minds must have been that plaintiff might have got safely over the walk if she had not met Mr. Bateson, and that therefore she was not guilty of contributory negligence in going on the walk even though it was in a notoriously unsafe condition.

This tended to confuse them to the prejudice of defendant. If the walk "was in a bad condition and

evidently so—so that it was palpably in bad condition," as the court tells the jury the plaintiff says—(Record, p. 61), she had no right to take her chances in going over it.

VII.

The court refused to charge the jury as prayed by the plaintiff in error in its 6th and 7th requests.

6. That upon the testimony of the plaintiff herself, she allowed forty-eight hours, namely, from Saturday morning until Monday morning, to pass without calling in any medical aid or assistance at the most critical period of her injuries, during which time, it appears from the testimony of Dr. Gilmartin, that prompt and efficient treatment might have prevented all the more serious consequences of the injury from which she is now suffering, and there is nothing in the testimony from which the jury can rightfully determine what might or might not have been the extent of the plaintiff's injuries had she received prompt and proper treatment.

Therefore the plaintiff cannot recover in this case damages for any permanent or consequent injuries, but only for the pain and suffering occasioned by the direct wounds of the fall.

Record, p. 60.

7. That inasmuch as under the testimony it clearly appears that the plaintiff's own neglect of her case in delaying to summon medical aid for a period of forty-eight hours after the injury, may have contributed in a great measure to the permanent injuries from which the

plaintiff testifies she is now suffering. And there are no data in the case from which the jury can rightfully determine what the plaintiff's injuries would have been had she received prompt and proper treatment. The plaintiff cannot recover in this action any damages based upon any permanent or progressive injuries to her constitution.

Record, p. 60.

In connection with these refusals, the Court instructed the jury:

"Now, sometimes a person — as I have remarked to counsel in the progress of the trial — a person will receive a very slight injury, apparently, and yet it may turn out to be a very serious injury, and the injury at first may be so slight that he does not feel as though he would be authorized to call in the aid of a physician, and yet in the course of time more serious symptoms may set in and the injury may prove to be even a fatal one, as, for instance, suppose a person was to scratch himself with a knife and poisoning should set in after two or three days, I should hardly say that the mere fact that a person scratched himself with a knife would render it negligence upon his part not to call a physician immediately. Scarcely any person would do that with a mere scratch with a knife, and yet the scratch of a knife may prove, if the knife happens to be poisoned, to result in blood poisoning, or in lock-jaw, or in some fatal disease. Well, now, if the injury was so trivial as not to call upon a reasonable person to call a physician immediately, why, then, the fact that she did not call a physician a once, would not bar or preclude her from recovering the whole

damage for the whole injury which afterwards the accident may be shown to have resulted in.

Record, p. 64.

Plaintiff in error duly excepted to these rulings separately:

Record, pp. 60 and 64.
Thirteenth, fourteenth and fifteenth Assignments of Error, Ante , p. 21 and 22.

I understand the law to be that an injured party is not entitled to recover for damages which might have been avoided by the use of slight care and diligence after becoming aware of the injury complained of.

Worth vs. Edmunds, 52 Barbour R., p. 40.
Illinois R. R. Co. vs. Finnigan, 21 Ill. R., p. 646.

Nor for damages which at a trifling expense, or by reasonable exertions he might have prevented.

Douglass vs. Stephens, 18 Missouri R., p. 362.

In this case the Court says: "Whatever plaintiff voluntarily suffers, which by reasonable exertion he might avoid, he must charge to his own account."

Railway Company vs. Eddy, 72 Ills. R. p. 128.

This was an action brought by an employee against Railway Company to recover for injuries sustained by reason of a fall from a ladder furnished by the company and used by him in the course of his employment.

The Court, speaking through Walker J., say "a party claiming damages for an injury caused by the negligence of another, must, after the injury is received, act as a prudent man would under the circumstances, and use due diligence to know whether medical

aid is required, and to have him self-cured. He has no right to act recklessly in this regard and then charge the defendant for the effect of such conduct; and it should be left to the jury whether the party injured has used due diligence to have him self cured or not," and further that an instruction which "informs the jury, that, although he might have placed himself in a better bodily condition by the employment of medical aid, he would not be chargeable with negligence unless he knew or had reason to believe in the exercise of a sound judgment, he needed medical aid, and then it could only be considered in mitigation of damages," does not state the law correctly.

Louisville, etc. Ry. Co. vs. Falvey, 104 Ind., 409

Elliott, J., delivering opinion of Court, says: "The Court below gave the following instruction:

"'It was the duty of the plaintiff to use ordinary care, judgment and diligence in securing medical or surgical aid after she received the injuries complained of if any she received, and if you find from the evidence that after she received such injuries, if any she did receive, she failed to use such ordinary care, judgment and diligence in procuring timely medical or surgical aid; and if you further find from the evidence that, by reason of such failure, her condition is now different and worse than it would have been if she had used such ordinary care, diligence and prudence in the premises, then, if you find for the plaintiff, you should take that into account in making up your verdict, and should not allow any damages for ailments and diseases, if any, that may have resulted from such a failure:' This instruction expresses the law correctly."

Jenkins vs. Inhabitants of Wilbraham, 11 Gray R., 142.

A loaded wagon was strained and injured through a defect in the highway. Driver examined the wagon and proceeded, and while on a level piece of road, the axle tree broke and the driver was thrown from the wagon and injured. *Held* that the breaking of the axle tree had been caused in part by the driver proceeding on his journey after the first injury to it, and there was no sufficient evidence submitted to the jury in support of an action by the driver against the town for personal injury to him.

That damages are not allowed for injurious consequences that might have been avoided by plaintiff.

See Sedgwick on the Measure of Damages, 6 Ed., p. 105, et sq. and cases cited.

This doctrine is sanctioned by the United States Supreme Court in a case of contract in United States vs. Smith, 94 United States, 214.

The Court speaking, through Mr. Chief Justice Waite p. 218, approves a rule awarding damages sustained by the actual breach of contract, but "not allowing anything for loss or injury to his materials which he might have prevented by the exercise of reasonable care and prudence."

The trial Court while seeming to recognize the rule, in reality modified it by its suggestions as to a slight or trivial injury in a way prejudicial to the plaintiff in error. There was nothing in the testimony to warrant such an hypothesis.

The plaintiff herself testified, that at the time of the accident "I fell forward on my head and I lay there I do not how long. I tried to get up and could not. He picked me up and carried me to the station. The blood

gushed out of my nose. He left me there and the policemen took charge of me, bathed my face and put a plaster on my nose and gave me something in a glass. I thought it was whisky and I sat there quite awhile and I said I must go home. All my idea is to get home. I was feeling so shook up and bad. I got home at last. I do not recollect how I got home. It seemed as though I was dazed, everything was in a cloud. My nose wss cut badly and my forehead was badly cut and terribly bruised. * * * When I got home I was feeling pretty bad but thought if I rested and kept still the effects would wear off, but instead of that I kept getting worse. I was very uneasy. I had a friend staying with me and towards evening I got so uneasy I could not rest anywhere, and a tingling sensation all along my right side, just as though—was running pins all in my side.

Record, p. 38.

This is very different from a trivial injury. No comparison between it and a scratch on the finger; yet in this condition the plaintiff waited two whole days before she called in a physician.

Two days when according to the medical testimony time was of the very utmost importance, yet the court leave it to the jury to say whether plaintiff ought to have sent for a physician sooner or not.

There is no conflict of testimony as to any of the facts.

The plaintiff herself states a case of such an injury that it was, as matter of law, unjustifiable negligence to delay for two days in sending for a physician.

The decisions in

D. & M. R. R. Co. vs. Steinberg, 17 Mich., 99.
Davis vs. D. & M. R. R. Co, 20 Mich., 106.
Schofield vs. St. Paul Railway Co., 114 U. S., p. 615.
R. R. Co. vs. Houston, 95 U. S., p. 697.

above cited are in point here also.

For the foregoing reasons I submit that the judgment of the Circuit Court of the United Utates for the Eastern District of Michigan should be reversed and a new trial granted.

HENRY M. DUFFIELD,
Attorney for the Plaintiff.

Supreme Court U. S.
APR 19 1888

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

THE CITY OF DETROIT,
Plaintiff in Error.

vs.

ELIZABETH S. OSBORN,
Defendant in Error.

No. 901.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

Motion to Advance and Brief for Plaintiff in Error in Support of Motion.

HENRY M. DUFFIELD,
Attorney for Plaintiff in Error.

F. H. CANFIELD,
Attorney for Defendant in Error.

DETROIT:
WM. F. MOORE, PRINTER, 44 LARNED STREET WEST.
1888.

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE CITY OF DETROIT, *Plaintiff in Error,* vs. ELIZABETH S. OSBORN, *Defendant in Error.*	No. 901. Error to the Circuit Court of the United States for the Eastern District of Michigan.

MOTION TO ADVANCE AND BRIEF FOR PLAINTIFF IN ERROR IN SUPPORT OF MOTION.

MOTION.

The plaintiff in error comes by Mr. Henry M. Duffield, its counsel, and respectfully asks that the above entitled cause may be advanced on the call and order of the docket and a day assigned for its hearing, for the following reasons:

First—For the special and peculiar circumstances set forth in this motion and accompanying affidavits.

Second—Because the case in the court below, which is sought to be reviewed in this court, is an action for damages for injuries suffered by the plaintiff below from a fall upon an alleged defective sidewalk on one of the public streets in the City of Detroit, and there are now pending in the Circuit Court of the United States, for the Eastern District of Michigan, suits of like character against the plaintiff in error in this case, in which damages are claimed and sought to be recovered in the sum of eighty-five thousand dollars.

And there are also pending and being prosecuted against the plaintiff in error in this case, other claims of like character with the claim of the defendant in error in this case, in favor of parties claiming to be aliens or citizens of other States than the State of Michigan, which are threatened to be put in suit in the event of a denial of said claims by the plaintiff in error in this case, the damages wherein amount to the sum of one hundred thousand dollars, making, together with the amounts claimed in the cases now pending in the Circuit Court of the United States, for the Eastern District of Michigan, an aggregate of one hundred and eighty-five thousand dollars.

In all these cases and claims the question of the liability of the City of Detroit, under its charter, for the negligence or non-feasance of its officers and agents in the care and control of its public streets, is identical with the question in this case.

And the decision in this case will settle and conclusively decide that question as to all the other above mentioned cases. But until such a decision is had in this case, the plaintiff in error will be compelled to sue out successive writs of error upon the judgments rendered in each of such cases in which the amount recov-

ered will give this court jurisdiction to issue a writ of error. And in the cases where the judgments are for less amounts, the plaintiff in error will be compelled to pay judgments which the final decision of this court in this case, if in favor of the plaintiff in error, will determine and adjudge are unjust, unwarranted and against the rights of the plaintiff in error.

This motion is based upon the abstract of the Record and the affidavits of Henry P. Sanger and John B. Whelan, hereto attached.

HENRY M. DUFFIELD.
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

THE CITY OF DETROIT, *Plaintiff in Error,* vs. ELIZABETH S. OSBORN, *Defendant in Error.*	Error to the Circuit Court of the United States for the Eastern District of Michigan.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE. }

John B. Whelan, being duly sworn, deposes and says that, at the request of Henry M. Duffield, he has examined the suits pending in the Circuit Court of the United

States for the Eastern District of Michigan, against the City of Detroit, by persons claiming damages for injuries from defective sidewalks, and that the annexed schedule is a correct list of such pending cases, together with the amounts claimed in the *ad damnum* clauses of the respective declarations.

And further deponent saith not.

JOHN B. WHELAN.

Subscribed and sworn to before me this 1st day of February, A. D. 1888.

BETHUNE DUFFIELD,
Notary Public, Wayne County, Michigan.

"SCHEDULE,"

Mary J. Cowan vs. City of Detroit.	Damages claimed...	$25,000
Jane Ann Watt vs. City of Detroit.	" " ...	5,000
Thos. J. Whitbourne vs. City of Detroit.	" " ...	10,000
Catharine Wood vs. City of Detroit.	" " ...	10,000
Sarah Wilkes vs. City of Detroit.	" " ...	5,000
Mary E. Fields vs. City of Detroit.	" " ...	10,000
Benjamin Gath vs. City of Detroit.	" " ...	20,000
		$85,000

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

THE CITY OF DETROIT,
Plaintiff in Error.
vs.
ELIZABETH S. OSBORN,
Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE. }

Henry P. Sanger being duly sworn, deposes and says that he is the City Accountant of and for the City of Detroit, and has intimate knowledge of all claims filed and presented against said City of Detroit in accordance with the terms of its Charter.

Deponent further says that he has made careful examination of the claims on file and pending before the Committee of the Common Council of the City of Detroit on Claims and Accounts, and that the list annexed hereto is a true statement of said pending claims; those listed under "Schedule A" being claimants who state in their petitions that they are aliens, and specify the amounts of their several claims, and the aggregate of whose claims amount to $22,500.

Those listed under "Schedule B" being claimants who represent that they are aliens but do not specify the amount of their respective claims.

Those listed on 'Schedule C" being claimants who are silent as to their citizenship, but, as deponent is

informed and believes, are aliens, and specify the amount of their respective claims the aggregate of which amounts to $16,500.

Those listed on "Schedule D" being silent as to their respective citizenships, but, as deponent is informed and believes, being aliens, and who do not specify the amounts of their respective claims.

And deponent further says that he verily believes from his knowledge of the claims, and his examination of the papers in connection therewith, that the total aggregate of claims made against the City of Detroit for injuries claimed to have been caused by defective sidewalks including those in the annexed schedules in which the amounts of the respective claims are stated, will exceed the sum of $100,000.

And further deponent saith not.

HENRY P. SANGER.

Subscribed and sworn to before me this 1st day of February, A. D., 1838.

JOHN B. WHELAN,
Notary Public, Wayne County, Michigan.

"SCHEDULE A."

Louisa Schmahl	$ 2,500
Jas. T. Granny	10,000
Ann Louerd	2,000
Eliza Pichler	5,000
Emma Clock	3,000
	$22,500

"SCHEDULE B."

Bertha Keidell—Amount of damages not stated.
Thomas Rundele—Amount of damages not stated.
Bertha Roth—Amount of damages not stated.
Christine Neuman—Amount of damages not stated.

"SCHEDULE C"

Ellen Caster	$ 500
Mary E. Jones	5,000
Julius Borck	6,000
Caroline Shultz	5,000
	$16,500

"SCHEDULE D."

Elizabeth Wells—Amount of damages not stated.
Mrs. Macy—Amount of damages not stated.
John D. Godfroy—Amount of damages not stated.
Amy C Girling—Amount of damages not stated.

THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

Eastern District of Michigan } *ss.*

Elizabeth S. Osborn, who is a citizen of the State of Ohio, by Moore & Canfield, her attorneys, complains of the City of Detroit, a municipal corporation existing under the laws of the State of Michigan, and a citizen of the State of Michigan, defendant herein in a plea of trespass upon the case, filing this declaration as commencement of suit: For that

WHEREAS, The said defendant is a municipal corporation, under the laws of the State of Michigan, having a charter granted by the Legislature of the State of Michigan, under which charter said defendant, through its Common Council, is authorized to grade, pave repair and otherwise improve the highways, streets, avenues, lanes, alleys or interior public places created by the intersection

of the streets, crosswalks and sidewalks in said city, and also to construct and repair all sidewalks in said city.

And the plaintiff avers that, under its charter, it is the duty of said defendant to keep and maintain its streets and sidewalks in good and safe repair, so that all persons may pass and repass safely over the same; but that the said defendant, in disregard of its duty in this respect, negligently and wrongfully, on the 19th day of November, 1883, and for a long time prior thereto, allowed the sidewalk on the north side of Church street, and adjoining the police station in said city, to become defective, decayed and out of repair, and to be and remain in a dangerous and unsafe condition; that defendant had full notice of the unsafe condition of said walk, but negligently and wrongfully neglected to repair the same; that said Church street is one of the streets of said city, and that on the said 19th day of November, 1883, the said plaintiff, while lawfully passing along said sidewalk, in a prudent and careful manner, and without any notice of the dangerous and defective condition of the said sidewalk, and without any fault or neglect on her part, was, by the reason of such dangerous and defective condition of said sidewalk, tripped and was thrown down and caused to fall, and was thereby greatly bruised and injured, and thereby became lame, blind, sick and disordered, and has so remained from thence hitherto; during all which time the plaintiff underwent great bodily pain, and was prevented from attending to her usual business, and was forced to lay out great sums of money for medical attendance, amounting in all to $1,000, in endeavoring to cure her of her injuries, all to the plaintiff's damage of $20,000;

For that whereas, also, The said defendant is a muni-

cipal corporation under the laws of the State of Michigan, having a charter granted by the Legislature of said State, under which charter said defendant, through its Common Council, is authorized to grade, pave, repair or otherwise improve the highways, streets, avenues, lanes or interior public places created by the intersection of the streets, crosswalks and sidewalks in said city;

And whereas, At the time of the injury hereinafter set forth, and for a long time prior thereto, it was the duty of the said defendant to keep and maintain its streets and sidewalks in good and safe repair, so that all persons may pass and repass safely over the same;

And whereas, A certain other street, to wit: Church street, in said city, is one of the public streets of said city, and the sidewalk along the north side of said street is a sidewalk, which it is, and at the time of the happening of the injury herein complained of and prior thereto, it was the duty of said defendant to maintain and repair as aforesaid.

And the plaintiff avers that on the 19th day of November, 1883, and for a long time prior thereto, said sidewalk on the north side of Church street and between Michigan avenue and Trumbull avenue became and was defective and decayed and certain planks thereof and timbers thereof became worn, decayed, loose and so insecurely fastened, and said sidewalk was in other respects so defective, decayed and out of repair as to endanger persons passing over and along said sidewalk; that the said defendant, prior to said 19th day of November had notice of the defective and dangerous condition of said sidewalk, and the said defendant had a reasonable opportunity after said sidewalk became unsafe and out of repair as aforesaid and before the happening of the injury herein complained of, to put the same in proper

repair, and that it was the duty of said defendant, prior to the day aforesaid to repair said sidewalk and cause the same to be put in good repair and so maintained. Yet the said defendant, in disregard of its duty in the premises, wrongfully neglected to repair said sidewalk, and wrongfully and negligently permitted said sidewalk to be and remain out of repair, and in the defective, unsafe and dangerous condition aforesaid, to-wit: from the 1st day of October, 1883, up to and including said 19th day of November, 1883; and that on said 19th day of November the plaintiff while lawfully passing along said sidewalk in a prudent and careful manner, and without notice on her part of the dangerous and defective condition of said sidewalk, and without any fault or neglect on her part, was by reason and in consequence of the dangerous and defective condition of said sidewalk as aforesaid, and by reason of the planks thereof being decayed, loose, worn and insecurely nailed and fastened, tripped and thrown down and caused to fall and was thereby greatly bruised and injured, and thereby became lame, blind and sick and disordered, and has so remained from thence hitherto; during all which time plaintiff underwent great bodily pain and was prevented from attending to her usual duties as a housekeeper, and was forced to lay out large sums of money for medical attendance, amounting in all to one thousand dollars, in endeavoring to cure her of said injuries, sickness, wounds and disorders, and hath been otherwise damnified, to-wit: at Detroit, in the district aforesaid, to the damage of the plaintiff of twenty thousand dollars.

For that whereas also, heretofore to-wit, at the time of the injury hereinafter set forth, to-wit: on the 19th day of November, 1883, and for more than ten years prior thereto in the City of Detroit, in said district, the said

defendant has kept and maintained a common and public street or highway known as Church street, a portion of which street lies between Michigan avenue and Trumbull avenue, which are also public streets in said City, and along the northerly side of said Church street and between said avenues has kept and maintained a sidewalk for the use of travelers on foot, to-wit: at Detroit in said District.

And whereas said Church street and said sidewalk thereon at the time of the injury hereinafter set forth, and for more than ten years prior thereto, were open to public travel, and for all persons to travel over and along, and were within the jurisdiction and under the power and control of the City of Detroit, the defendant herein, to-wit, at Detroit in said District.

And whereas, It was the duty of said defendant to keep said Church street, and said sidewalk thereon situated, in good repair, so that it should be safe and convenient for all persons at all times to travel over and along and to pass and repass thereon, to wit: in Detroit in said district. But the plaintiff avers that said defendant, in neglect of its said duty, carelessly, negligently and wrongfully allowed and permitted said sidewalk to get and become wholly out of repair and good order, and permitted and allowed the planks and timbers thereof, and of which said sidewalk was composed, to become and remain rotten, decayed and defective, and to become loose and unfastened and displaced, so that said sidewalk became, and was at the time of the injury hereinafter described, and a long time prior thereto, out of repair, and wholly unsafe and unfit for travel, or for people to pass over on foot or otherwise, of all which the said defendant had full notice; and said defendant had a reasonable time and opportunity after said sidewalk

became out of repair and unsafe and unfit for travel as aforesaid to put the same in proper condition for use and in proper and safe repair; and said defendant knowingly, carelessly, negligently and wrongfully permitted and allowed said sidewalk to be and remain out of repair and good order for a long space of time, to wit: from the 15th day of October, 1883, until and after the time of the injury of said plaintiff hereinafter set forth; and said defendant did not use reasonable diligence in the premises, but carelessly, negligently and knowingly neglected to put and keep said sidewalk in good order and repair, and in a reasonable, safe and fit condition for travel and use for the public, as the said defendant was in law bound to do. And during the time when said sidewalk was, so as aforesaid, out of repair and good order, to wit: on the 19th day of November, 1883, at Detroit aforesaid, the plaintiff, while passing along over said sidewalk, in a prudent and careful manner, and without notice of the unsafe and dangerous condition of said sidewalk, and without any fault or neglect on her part, by reason and in consequence of said sidewalk being out of repair and unfit and unsafe for travel, as aforesaid, was tripped and caused to fall, and was then and there thrown to and upon said sidewalk with great force and violence, and was severely hurt, bruised and wrenched, and was otherwise severely wounded and lamed; and by reason of said fall, and the hurts and injuries so received as aforesaid, said plaintiff then and there became and was sick, sore, weak, lame and disordered and blind, and so remained and continued from thence hitherto, and the plaintiff has suffered and endured great pain and suffering, and was wholly disabled and incapacitated from attending to her business and duties as a housekeeper, and was forced to, and did necessarily, lay out and expend large sums of

money in medicine, nursing and medical attendance in endeavoring to cure her said hurts and injuries, to wit: the sum of one thousand dollars ($1,000), and she was otherwise greatly injured and damaged, to wit: at Detroit aforesaid, to the damage of the plaintiff of twenty thousand dollars.

That her claim for such damages and injuries was heretofore, to wit: on or about the 10th day of March, 1884, by her presented to the Common Council of said city for audit and allowance, and the same was by said Council rejected, and, therefore she brings suit.

MOORE & CANFIELD,
Attorneys for Plaintiff.

To H. M. DUFFIELD, ESQ.,
Defendant's Attorney:

Take notice, that the foregoing is a copy of the Declaration filed in the within mentioned cause as amended.

MOORE & CANFIELD,
Plaintiff's Attorneys.

DATED November 28, 1885.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

ELIZABETH S. OSBORN
vs.
THE CITY OF DETROIT.

And now comes the above named defendant, by Henry M. Duffield, its attorney, and demands a trial of the matters set forth in the plaintiff's declaration.

HENRY M. DUFFIELD,
Attorney for Defendant.

BRIEF.

The action in the court below was trespass on the case for injuries sustained by the defendant in error by falling on a defective sidewalk, in the City of Detroit. The plea was the general issue. The plaintiff recovered a verdict in the sum of ten thousand dollars and costs. Judgment was entered on the verdict. A Bill of Exceptions was duly settled. The following facts appear from the Record:

The City of Detroit is a municipal corporation, and has been such since 1805. Those portions of its charter in force at the time of the alleged accident to the defend-

ant in error, and the trial of the cause in the court below bearing upon the controversy, are as follows:

"TITLE I.

"CHAPTER VII.

"(SECTION 116) SEC. 33. The Common Council shall have power to make, grade, improve and adorn the public squares, spaces, grounds and parks belonging to or under the control of the corporation, and to control and regulate the same consistently with the purposes and objects thereof. It shall have power to establish, open, widen, extend, straighten, alter, vacate and abolish highways, streets, avenues, lanes, alleys and public grounds or spaces within said city, and to grade, pave, repair and otherwise improve the highways, streets, avenues, lanes, alleys or interior public spaces created by the intersection of streets, crosswalks and sidewalks in said city, with stones, wood, brick or other material; and the Common Council shall have full power and authority to provide for the paying the costs and expenses thereof by assessment in such manner as shall be prescribed by law, which assessment shall be a lien, until paid, on the lot, lots or premises on which the same are bounded, and shall be collected in such manner as shall be authorized by law." * * * * *

Local Acts, (Mich.) 1883, p. 604.

"(SECTION 140) SEC. 57. The Common Council shall have power to provide and ordain by ordinance that whenever any sidewalk requires to be built or repaired, the said Council may direct the Board of Public Works to notify the owner, agent or occupant of any lot or parcel of land in front of or adjacent to which such walk

is required to be built or repaired, to build or repair the same; and that if such agent, owner or occupant shall neglect, for a time to be specified in the ordinance, to do such building or repairing, it shall be the duty of the said Board to at once do, or cause the same to be done; and in such case the expense thereof shall be assessed upon such lot or parcel of land, and shall be a lien thereon until collected and paid in a manner to be prescribed in such ordinance; and the owner so neglecting to build or repair shall be liable to the city for all damages which shall be recovered against the city for any accident or injuries occurring by reason of such neglect, and also to prosecution in the Recorder's Court, and, on conviction, to be fined not to exceed five hundred dollars and the penalties in the City Charter elsewhere provided. The Common Council shall also have power, by ordinance, to designate and determine the materials of which all sidewalks in the city shall be constructed, and to regulate their width and manner of construction." * * * * *

Local Acts (Mich.) 1883, p. 614.

From 1857, and subsequently to and including 1871, the following were the only provisions in the Charter of the City of Detroit bearing upon the question of the city's liability in actions for injuries from defective sidewalks:

"CHAPTER V.

"(SECTION 103) SEC. 22. The Common Council * * * shall have power within the limits and jurisdiction of the corporation * * *

"11. To establish, open, widen, extend, straighten, alter, vacate and abolish highways, streets, avenues, lanes, alleys and public grounds or spaces within said

city, and to grade, pave, repair and otherwise improve the highways, streets, avenues, lanes, alleys or interior public spaces created by the intersection of streets, crosswalks and sidewalks in said city, with stone, wood, brick or other material; and the Common Council shall have full power and authority to provide for paying the costs and expenses thereof by assessment on the owner of the lot or premises in front of or adjacent to which such highways, streets, avenues, lanes, alleys, interior or public spaces, crosswalks or sidewalks may be directed to be graded, paved, repaved or otherwise improved." * * *

Laws of Michigan, 1857, pp. 94 and 96.

"(SECTION 105) SEC. 24. The Common Council shall have power * * *

"3. To provide and ordain by ordinance, that whenever any sidewalk requires to be built or repaired, the Common Council or any Alderman may direct the Street Commissioner to notify the owner, agent, or occupant of any lot in front of or adjacent to which such walk is required to be built or repaired, to build or repair the same, and that if such agent, owner or occupant shall neglect, for a time to be specified in the ordinance, to do such building or repairing, it shall be the duty of the Street Commissioner to at once do or cause the same to be done, and the expenses thereof shall be a lien upon the lot, to be assessed therein and collected in a manner to be prescribed in such ordinance, and further to provide that the owner, agent or occupant so neglecting to build or repair shall be liable to the City for all damages which shall be recovered against the City for any accidents or injuries occurring by reason of such neglect, and also to prosecution in the Recorder's Court, and on

conviction to be fined not to exceed fifty dollars, and that if the Street Commissioner neglect, when required to give such notice, or to have such walk built or repaired within such time as such ordinance shall prescribe, he also shall be liable to similar prosecution and fine." * * *

Laws of Michigan, 1865, pp. 678, 679.

While these last quoted provisions of the Charter of the City of Detroit were in full force, the Supreme Court of the State of Michigan, prior to the alleged accident to the plaintiff, and the trial of this cause in the Court below, had decided in the case of

Detroit vs. Blakeby, 21 Mich., R. p. 84,

that

"Charters to municipal corporations in the State of Michigan are not contracts * * * They create governmental agencies."

'Municipal officers are in no such sense municipal agents, that their negligence is the neglect of the municipality; nor will their misconduct be chargeable against it. * * * The streets of Detroit are public highways like all other roads; the duty of keeping them in repair is a duty to the public, not to private individuals, the mere neglect of which is a non-feasance only, and for an injury resulting from such neglect no action lies."

Subsequent to this decision, the Legislature of the State of Michigan, in 1879, passed an Act (Howell's Annotated Statutes of Michigan, Vol. 1, p. 418, Sec. 1442) providing, among other things, that "any person or persons sustaining bodily injury upon any of the public highways or streets in this State by reason of neglect to keep such public highways or streets, and all bridges, crosswalks and culverts on the same in good repair, and in a condition reasonably safe and fit for travel, by the

township, village, city or corporation whose corporate authority extends over such public highway, street, bridge, crosswalk or culvert, and whose duty it is to keep the same in good repair, such township, village, city or corporation shall be liable to, and shall pay to the person or persons so injured or disabled, just damages, to be recovered in an action of trespass on the case before any Court of competent jurisdiction.

This statute remained in force up to the date of the accident, and the recovery of the judgment, to reverse which, this writ of error is brought.

It was construed by the Supreme Court of the State of Michigan in the case of

Detroit vs. Putnam, 45 Mich. R. p. 263,

not to create a municipal liability for injuries caused by defective sidewalks.

The ground of the decision was that the special terms used, (to-wit: bridges, crosswalks and culverts), did not enlarge, but limited the force of the general words used.

Subsequent to this decision, and on the 17th day of June, 1885, the Legislature attempted to repeal the section above quoted, and to include in the liability of cities, townships and villages, negligence in the care of sidewalks. But the Supreme Court of the State of Michigan, in the case of

Church vs. City of Detroit, 31 North West. R., p. 447,

decided that this Act was unconstitutional for reasons stated in the opinion. The liability, if any, therefore, of the plaintiff in error, at the time of the alleged accident, and at the time of the trial, depended upon the charter powers of the plaintiff in error as a municipality, and the duties arising thereon.

The contention of the plaintiff in error in this case, is that the decision in the Blackeby case above cited, is a construction of the Charter of the plaintiff in error, which is a State law, by the Court of last resort of the State, and as such, binding and conclusive upon the Federal Courts. The trial Court held, in accordance with the long established practice of that Court, that the case was ruled by the decisions of this Honorable Court in

> The City of Providence vs. Clapp, 17 Howard, R. p. 161.
> Wightman vs. Washington City, 1 Black, R. p. 39.
> Chicago vs. Robbins, 2 Black, R. p. 418.
> District of Columbia vs. Armes, 107 U. S., R. p. 519,

and declined to consider the question raised by counsel for plaintiff in error, that under the decision of the Supreme Court of the State construing the city's charter against the liability of the city, the above cited cases were not relevant, and the plaintiff was entitled to an instruction to the jury to render a verdict in its favor.

There are some other errors assigned, but this is the principal question in the cause.

It is shown by the accompanying affidavits that suits claiming damages amounting to eighty-five thousand dollars, are now pending in the Circuit Court of the United States for the Eastern District of Michigan, upon claims identical with that of defendant in error in the case at bar, so far as the general question of the liability of the plaintiff in error is concerned, while other claims similar in character, amounting to one hundred thousand dollars, are pending and will be probably put in suit.

This cause is No. 901 of the docket for this term, and cannot be heard in its regular course on the docket for upwards of two years. During this time many other suits of like character will undoubtedly be begun and proceed to judgment.

It is not improbable that the City will be mulcted from $75,000 to $100,000 for payment of judgments upon claims which the decision of this court in the case at bar may ultimately determine are unjust and unwarranted.

The Circuit Court of the United States for the Eastern District of Michigan has announced from the bench that if this Honorable Court shall advance this cause for a reasonably early hearing, the Circuit Court will continue the trial of all pending cases until the final decision of this case.

The case seems, therefore, an eminently proper one to advance, and a denial of the motion might be the occasion of great and irremediable injustice to plaintiff in error.

HENRY M. DUFFIELD,
Of Counsel for Plaintiff in Error.

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1887.

No. 901.

THE CITY OF DETROIT,
Plaintiff in Error.

vs.

ELIZABETH S. OSBORN,
Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

Motion to Advance and Brief for Plaintiff in Error in Support of Motion.

HENRY M. DUFFIELD,
Attorney for Plaintiff in Error.

F. H. CANFIELD,
Attorney for Defendant in Error.

Supreme Court of the United States.

THE CITY OF DETROIT,
Plaintiff in Error,
vs.
ELIZABETH S. OSBORNE,
Defendant in Error.

Case No. 295, October Term, 1889.

BRIEF FOR DEFENDANT IN ERROR.

F. H. CANFIELD,
Counsel for Defendant in Error.

DETROIT:
John F. Eby & Co., Printers, 65 & 67 West Congress St.
1889.

Supreme Court of the United States

THE CITY OF DETROIT, *Plaintiff in Error,* vs. ELIZABETH S. OSBORNE, *Defendant in Error.*	*Case No. 295, October Term 1889.*

Brief for Defendant in Error.

This suit was commenced in the Circuit Court for the Eastern District of Michigan, by Mrs. Osborne a citizen of the State of Ohio, to recover damages for personal injuries occasioned by reason of a defective sidewalk in Church street, one of the public streets in said city of Detroit, and in front, or alongside of one of the metropolitan police stations of the city, usually known as the Trumbull Avenue Station. The record shows that the defects in the sidewalk were known to the police officers, and could be seen from the windows of the police station.

The accident occurred on November 19th, 1883. Suit was commenced September 13th, 1884, by declaration (Rec., p. 3). The declaration was subsequently amended. (See Rec., pp. 9 to 12.)

In the first count it is, among other things, alleged that it was the duty of the city to keep and maintain its streets and sidewalks in good and safe repair; but that, in disregard of this duty, the city allowed the sidewalk on the north side of Church street, and *adjoining the Police Station* in said city, to become defective and out of repair, and to be

and remain in a dangerous and unsafe condition, of which the city had notice, but negligently and wrongfully neglected to repair the same; that Church street is one of the streets of said city, and that the plaintiff, while lawfully passing along said sidewalk, in a prudent and careful manner, and without notice of its dangerous and defective condition, and without fault on her part, was, by reason of such dangerous and defective condition of said sidewalk, tripped and was thrown down, and was caused to fall, and was thereby greatly injured, etc. The other counts are in the usual form in such cases. The defendant filed a *general* demurrer (Rec., p. 13), which was overruled (Rec., p. 15), and then pleaded the general issue.

The trial of the case resulted in a verdict and judgment in favor of the plaintiff for $10,000, which judgment the city seeks to reverse upon writ of error in this court.

The cause comes to this court upon a bill of exceptions to the rulings made at the trial upon questions of evidence, and in the charge to the jury. But as the record contains no *assignment of errors*, as required by Sec. 997 of the Revised Statutes, and as we have not been served with any such assignment of errors, we are left in doubt as to the ground upon which a reversal of the judgment will be asked, and therefore submit that the plaintiff in error has no right to be heard in this court, and that the cause should be either dismissed, or that the judgment should be affirmed for want of an assignment of errors.

But if the court shall hear the case notwithstanding the record contains no assignment of errors, then I submit:

I.

That the city is liable for injuries resulting to the plaintiff by reason of the defective condition of the sidewalk in

this case, it being shown by the verdict that there was negligence on the part of the city, and no contributory negligence on the part of the plaintiff.

Under its charter, the city has sole control, exclusive of the State, of its streets and highways. It is its duty to keep its streets, highways and sidewalks in proper repair. Full authority is given by its charter for this purpose, and ample means provided to defray the expense. By Sec. 121 of the Charter of 1883, which was in force at the time this accident happened, it is declared that the Common Council shall have power to establish, open, widen, vacate and abolish streets, avenues, lanes, alleys and public grounds or spaces within said city; and to grade, pave, repair and otherwise improve the streets, avenues, lanes, alleys or interior public spaces created by intersection of streets, cross walks and *sidewalks* of said city, and "*shall have full power and authority to provide for paying the costs and expenses thereof by assessment, which assessment shall be a lien on the lot or lots or premises on which the same are bounded, and shall be collected in the same manner as the same shall be authorized by law.*"

Although the language of the charter is permissive, it imposes the same duties and obligations as if the language was mandatory. The acceptance by the city of the power under its special charter carries with it the duty of its faithful execution.

By Sec. 145 of the Charter, the duty is made mandatory. It is there declared that "the Common Council shall have "power to provide and ordain by ordinance that, whenever "any sidewalk requires to be built or repaired, the said "Council may direct the Board of Public Works to notify "the owner, or agent, or occupant of any lot or parcel of "land in front of or adjacent to which such walk is required "to be built or repaired, to build or repair the same, and "that if such agent, owner or occupant shall neglect, for a

"time to be specified in the ordinance, to do such "building or repairing, *it shall be the duty of said Board "to at once do, or cause the same to be done,*" etc. We will call attention to this section under another point in our brief.

We do not feel called upon to discuss at length the proposition that municipal corporations in a case like this are liable for injuries resulting from defective streets or sidewalks, as the rule has been firmly established by the decisions of this court, as well as by decisions of the courts of most of the States of the Union. We cite for convenience, however, the following cases:

Weightman vs. Washington, 1 Black., 39.
Chicago vs. Robbins, 2 Black., 418
Nebraska vs. Campbell, 2 Black., 590.
Robbins vs. Chicago, 4 Wallace, 657.
Evanston vs. Gunn, 99 U. S, 667
Meyer vs. Sheffield, 4 Wallace, 194.
Manchester vs. Ericsson, 105 U. S., 347.
Barnes vs. The District of Columbia, 91 U. S., 540.

In the case last cited, at page 551, it is said that the authorities establishing "*the doctrine that a city is responsible for its mere negligence are so numerous and so well considered that the law must be deemed to be* SETTLED *in accordance with them.*"

See also

2 Dillon on Municipal Corporations, 3 Ed., § 1017 and note

The case of *Carrington vs. St. Louis*, 89 Mo., 208, in its facts closely resembles the one at bar. In that case, as in this, the plaintiff was injured by reason of the unsafe condition of a sidewalk adjoining a police station, which was in charge of police commissioners appointed by the Governor. It was held that the negligence of the police in permitting the sidewalk to be in a dangerous condition was

imputable to the city; that the police were agents of the city; that the knowledge of the police of the defect in the sidewalk was notice to and the knowledge of the city, and that the city was therefore liable.

I submit that this court is not, in this case, obliged to depart from its own rulings, or to repudiate a doctrine which it has declared to be *settled law* upon this subject, because of the decision of the Supreme Court of Michigan in *Detroit vs. Blackeby*, 21 Mich., 84, upon which plaintiff in error may rely, for the following reasons:

1st. The point is not presented by the record. The record shows that the defendant at the trial relied, not upon the rule supposed to be laid down in the *Blackeby case*, that municipal corporations are not liable for injuries caused by defective streets and sidewalks, but upon the statute of the State adopted in 1885 (Public Acts of Mich., 1885, p. 289), and that its counsel asked the court to instruct the jury,

"That the plaintiff could not recover in this case, because "the liability, if any ever existed on the part of the city, "has been abrogated by Act No. 214 of the Public Acts of "1885 of the State of Michigan, approved June 17th, 1885."

If the defendant wished to raise the question of the general common law liability of the city, the point should have been presented to the court below at the trial. This court will not, upon writ of error, hear or decide any question which the record does not show was properly presented at the trial in the court below.

The court properly refused to charge as requested by the defendant, for the reasons stated in the opinion delivered upon the motion for a new trial (see Rec., 23, 24), viz., that the statute referred to was not intended to operate

retroactively, and therefore did not apply to this case; and if it were otherwise, the statute would be unconstitutional.

See Opinion of the District Judge, Rec., pp. 23–24.
Kay vs. Penn. R. R., 65 Pa., 269.
Frasier vs. Town of Tompkins, 30 Hun., 168.
Wood on Retroactive Laws, Sec. 172.

The Act of 1885 has since been held to be unconstitutional by the Supreme Court of the State, because of a defect in the title of the Act, (*Church vs. City of Detroit*, 64 Mich., 571); and being unconstitutional, the liability of the city in cases of this kind rests upon its *special charter* and the general rules of law applicable thereto.

2d. The plaintiff in error cannot now in this court claim the benefit of the demurrer to the declaration (Rec., p. 13), which was overruled by the Circuit Court (Rec., p. 15).

(*a*) By pleading over issuably the defendant waived the benefit of the demurrer.

Cicotte vs. Wayne County, 44 Mich., 173–174.
Wales vs. Lyon, 2 Mich., 276.
Delahay vs. Clement, 2 Scammon, 575.
Early vs. Patterson, 4 Black, Ind., 449.
Veeder vs. Wright, 2 A. K. Marsh, 143.
Funk vs. The State, 1 English, Ark., 141–446.

At all events, if the defendant wished to preserve the point, or the benefit of the demurrer, its counsel should have done so either by a proper objection to testimony at the trial or by a proper request to charge the jury.

3d. The decision in the *Blackeby case* is not binding upon the Federal Courts, because it is not, nor does it pro-

fess to be based upon any statute of the State, or any *local law* of the State. It does not construe any statute or any clause of the State constitution, nor is it a rule of property. The case simply holds as a matter of *general* law, and upon principles of *general jurisprudence*, that incorporated cities are not liable for accidents resulting from a neglect to keep the streets in proper and safe repair. The result arrived at was simply a determination of private rights, "*by the application of common law rules alone.*"

Chicago vs. Robbins, 2 Black., 428.

We call attention to the fact that the *Blackeby case* was decided in 1870, and that the city charter then in force was repealed in 1883, and a new charter granted to the city. No decision has been made by the State court construing the charter of 1883.

What was said by this court in *The Town of Venice vs. Murdock*, 92 U. S., 501, respecting the decisions of the courts of New York upon the question there involved, can also be said of the decision of the Supreme Court of Michigan in the *Blackeby case*: It does not "present a clear case of statutory construction." It is not an attempt at interpretation. It asserts only general principles, to wit, that incorporated cities, although given exclusive control of their streets and sidewalks, and although provided with ample means to keep them in repair, are not, upon general common law principles, liable for injuries resulting from their negligence in this regard. There is no attempt to construe the city charter in the *Blackeby case*, nor is the charter referred to at all, except incidentally. Judge Campbell, who delivered the opinion of the majority of the court at p. 107, says that the question involved "depends on the consideration whether there is anything "in the *nature of incorporated municipalities* like this

"which should subject them to liabilities not enforced "against towns or counties." And after a review of the authorities, English and American, and after discussing the subject wholly upon general principles, he concludes that cities should not be held liable in suits of this kind.

He "*asserts this as a general proposition.*" He does "not assert that the statute so declares, or that such is even "its implied requisition."

Judge Cooley, in the dissenting opinion, also discusses the subject upon general principles only, and arrives at a different result. In concluding his opinion, he says (p. 123): "We are asked, therefore, to overrule a rule of law "which is safe, useful and politic in its operation, and "which has been *generally accepted throughout the Union*, "not through inadvertence or by surprise, but after careful, "patient and repeated examination upon principle, by many "able jurists, who have successively given due consider- "ation to the fallacies supposed to underlie it. For my own "part I must say that the fallacies are not clearly apparent "to my mind, and I therefore prefer to stand with the "*authorities*. And I deem it proper to add, also, that, "inasmuch as the rule of responsibility in question seems "to me a just and proper one, I should be inclined, if my "judgment of its logical soundness were otherwise, to defer "to the previous decisions, and leave the legislature to alter "the rule if they should see fit."

Again we repeat, that the decision in the *Blackeby case* is not based upon any constitutional provision, or upon any statute, or local rule of law of Michigan. The decision could have been made as well in any other State of the Union, and the reasoning of the court applies as well to the cities in New York, or Illinois, or Alabama, as to the city of Detroit. The decision, therefore, does not constitute the local law of the State, within the true meaning of the term "*local*" law, nor is it conclusive evidence of

what the local law of the State is; and therefore this court is not bound to follow it. See

Town of Venice vs. Murdock, 92 U. S., 494-501.
Boyce vs. Tabb, 18 Wall., 546.
Burgess vs. Seligman, 107 U. S., 20-33.
Delmas vs. Ins. Co., 14 Wall., 668.
Pana vs. Bowler, 107 U. S., 529-540.
Olwer vs. Rumford Chemical Works, 109 U. S., 83.
Swift vs. Tyson, 16 Pet., 1.
Hough vs. Railway Co., 100 U. S., 213-226.
Railroad Co. vs. National Bank, 102 U. S., 14.

In *Chicago vs. Robbins*, 2 Black., 418, which was a case in which the city sought to recover from the owner of the adjoining lot the amount of a judgment which it had paid for injuries occasioned by reason of a defective sidewalk, this court asserts that, "it is well settled that a municipal "corporation having the exclusive care and control of the "streets, is obliged to see that they are kept safe for the "passage of persons and property, and to abate all nui-"sances that might prove dangerous; and if this plain duty is "neglected, and any one is injured, it is liable for the dam-"ages sustained. The corporation has, however, a remedy "over against the party that is in fault, and has so used the "streets as to produce the injury, unless it was also a wrong "doer." It held that there was a remedy over against the adjoining owner, although the Supreme Court of Illinois, in *Scammon vs. Chicago*, which was a similar case, had decided differently. Speaking through Mr. Justice Davis, this court also said: "It was urged at the bar that this court, "in such cases, follows the decision of local courts. Where "rules of property in a State are fully settled by a series of "adjudications, this court adopts the decisions of the State "courts. But where private rights are to be determined "by the application of common law rules alone, this court, "although entertaining for State tribunals the highest res-"pect, does not feel bound by their decisions."

In *Barnes vs. District of Columbia*, 91 U. S., 540, this court distinctly refused to adopt the rule laid down in *Detroit vs. Blackeby*.

The case of *Bucher vs. Cheshier R. R. Co.*, 125 U. S., 555, is not an authority against us upon the point now under consideration. In that case it appears that the Supreme Court of Massachusetts had, in a cause between the same parties, and arising out of the transaction therein litigated, decided that a person who was traveling on the Lord's day contrary to the statute of that State, could not recover against the railway company for injuries caused by its negligence. The decision was based *upon the statute* itself, and was in accordance with the previous rulings of the court in several cases upon the same point. It was held that the Federal court would follow the ruling which had thus become the *settled* law of that State, although such ruling was contrary to what this court had held in a similar case which involved a similar statute of Maryland. But it clearly appears that the reason why this court followed the decisions of the Massachusetts court, was that those decisions were professedly, and *in fact based upon the State statute, and were in construction of that statute*. Thus it is said at page 584: "It "may be said generally that wherever the decisions of the "State courts relate to some law of a local character, which "may have become established by those courts, or has "*always* been a part of the law of the State, that the decis- "ions upon the subject are usually conclusive, and always "entitled to the highest respect of the Federal courts. The "whole of this subject has recently been very ably reviewed "in the case of *Burgess vs. Seligman*, 107 U. S., 20. "Where such local law or custom has been established by "*repeated* decisions of the highest courts of a State, it "becomes also the law governing the courts of the United "States sitting in that State."

The concluding paragraph of the opinion shows the real

gist of the decision in that case. The court says: "We "are of the opinion that the adjudications of the Supreme "Court of Massachusetts, holding that a person engaged in "travel on the Sabbath day, *contrary to the statute of the* "*State*, being thus in the act of violating *a criminal law* "*of the State*, shall not recover against a corporation upon "whose road he travels, for the negligence of its servants, "thereby establish this principle as a local law of that State, "*declaring, as they do, the effect of its statute* in its oper- "ation upon the obligation of the carrier of passengers. "The decisions on this subject by the Massachusetts court "are numerous enough and of sufficiently long standing to "establish the rule, so far as they can establish it, and we "think that, taken in connection with the relation which "they bear to the *statute itself*, though giving an effect to "it which may not meet the approval of this court, they "nevertheless determine the law of Massachusetts on that "subject."

There is no decision in Michigan which holds that the maintaining of such a suit as the one at bar is "contrary to any statute of the State," or which declares the effect of any statute in its operation upon the liability of the city for such claims as the one in this suit. Nor are the decisions in Michigan numerous enough, or "of sufficient long standing," or so consistent with each other, that it can be said of them that they establish the law of the State so as to be binding upon this court.

In *The Commissioners, etc., vs. Martin*, 4 Mich., 557, it was held that townships, being *quasi* corporatons, were not liable for damages occasioned by a want of repair of the highways; but a distinction is there recognized, by implication at least, between the liability of towns and the liability of incorporated cities. (See p. 562.)

In *The City of Detroit vs. Corey*, 9 Mich., 165, it was held that the city was liable for an accident caused by an

excavation for a sewer in one of its streets being left unguarded.

In *Dewey vs. The City of Detroit*, 15 Mich., 307, the plaintiff was injured by reason of a defective sidewalk, and the liability of the city therefor was plainly recognized; the court saying that the city "is responsible for reasonable "diligence in the performance of any duty which it is "capable of performing, so far as the means in its power "will enable it to act."

And in the *Blackeby* case, Judge Cooley, dissenting, said (p. 118):

"The decisions which are in point are numerous; they have "been made in many different jurisdictions, and by many "able jurists, and there has been a general concurrence in "declaring the law to be in fact what we have already said in "point of sound policy it ought to be. We are asked, never- "theless, to disregard these decisions, and to establish for this "State a rule of law different from that which prevails else- "where, *and different from that which, I think, has been "understood and accepted as sound law in this State prior "to the present litigation.*"

The Circuit Court in Michigan has uniformly refused to follow the *Blackeby case.*

See Record, p. 23.

The liability of the city of Detroit for defective sidewalks, as we have already stated, depends upon its special charter granted in 1883, subsequent to the passage of the Act of 1879, and upon the general rules of law applicable to that special charter.

The general statute of 1885, before referred to, and upon which defendant relied in the court below, was, as already stated, declared to be unconstitutional because of a defect in its title.

Church vs. City of Detroit, 64 Mich., 571.

And in 1887 (Public Acts of Mich., 1887, p. 345) a general law was adopted declaring that the towns, villages and cities in the State shall be liable for injuries occasioned by reason of defective streets, highways, bridges, sidewalks or culverts.

By Section 5 of this Act, it is delared that the common law liability of townships, villages and cities in this State, for or on account of bodily injuries sustained by reason of neglect to keep in repair public highways, streets, etc., is hereby abrogated; thus recognizing the existence of a common law liability at the time this act was passed. Of course this subsequent legislation does not affect this case, as the injury occurred before it was adopted. I cite it, however, for the purpose of showing what the policy of the State, as indicated by its legislation, has been upon this subject, and to show what the law of the State is at the present time.

But there is another reason why the court is not bound to follow the *Blackeby case*, in this suit. That case was decided in 1870. In 1883, and before the plaintiff met with her accident, the legislature of the State granted a *new* charter to the city, Section 57 of which declares: "The "Common Council shall have power to provide and ordain "by ordinance that, whenever any sidewalk requires to be "built or repaired, the said Council may direct the Board "of Public Works to notify the owner, agent, or occupant "of any lot or parcel of land in front of or adjacent to "which such walk is required to be built or repaired, to "build or repair the same, and that if such agent, owner or "occupant shall neglect, for a time to be specified in the "ordinance, to do such building or repairing, it shall be the "duty of the said Board to at once do or cause the same to "be done, and in such case the expense thereof shall be "assessed upon such lot or parcel of land, and shall be a "lien thereon until collected and paid in a manner to be

" prescribed in such ordinance; and the owner so neglect-
" ing to build or repair shall be liable to the city for all
" damages which shall be recovered against the city for any
" accident or injuries occurring by reason of such neglect,
" and also to prosecution in the Recorder's Court, and, on
" conviction, to be fined not to exceed five hundred dollars
" and the penalties in the city charter elsewhere provided."

I submit that the liability of the city in this case is clearly recognized, if not affirmatively declared by this section of the charter.

In *Detroit vs. Chaffee*, 37 N. W. Rep., 882, the city brought suit to recover under this section from the adjoining owner, the amount of a judgment recovered against it because of a defective sidewalk, and it was held by the Supreme Court of the State, that the city was entitled to recover. The court say: " The right of the plaintiff to a
" recovery in this case depends upon the question whether
" it was the primary duty of the defendant, as between him-
" self and the plaintiff, to keep the sidewalk in front of his
" premises in repair, so as not to cause accident or injury to
" persons traveling over the same. Exclusive control of the
" streets, including the sidewalks, is by the charter con-
" ferred upon the Common Council of the city. It is
" entirely discretionary with that body to say when and
" where sidewalks shall be *constructed* in front of adjacent
" property. There is no duty imposed upon an adjoining
" owner, or liability created for neglect, either to construct
" or keep in repair a sidewalk at the common law. The
" duty and liability are exclusively statutory. This duty is
" *first* imposed upon the adjacent land owner when the
" Common Council takes action under and in accordance
" with the provisions of the charter above quoted. When
" such action is taken, the duty to construct or repair is
" *primarily* laid upon the adjacent owner. Neglecting to
" perform this duty, it is secondarily imposed upon the

"Board of Public Works, an agent of the municipality." * * * * * * "It will not do to give the stat-"ute a strict construction, as to make it meaningless. In "order to give effect to a statute, courts will sometimes "transpose sentences, so as to place them in their just con-"nection with the context to which they relate. The legis-"lature intended to make the owner liable over to the city "in case it was obliged to pay damages occasioned by the "neglect of the owner to perform his duty." * * * * "The parties were not joint tort-feasors. There was a duty "resting on both with respect to the same thing, but it was "a separate duty imposed on each, and not joint. The "neglect was likewise the separate neglect of each and not "the joint neglect of both. But were this not so, and were "they in *pari delecto*, it would be a sufficient answer that "the statute expressly authorizes the action to be brought "in certain contingencies, such as are detailed in the record "before us."

In the case at bar the city itself is the adjoining owner.

What is a matter of local law, upon which the courts will follow the State decisions, and what are matters of general law in regard to which the Federal courts will exercise their own independent judgment, is always to be considered.

A statute or a constitutional provision of course is to be regarded as local law. And so where decisions of State courts have become rules of property, they will be adopted as a part of the local law. But where a decision has not become a rule of property, where it is based wholly upon general principles, where the result is arrived at by reasoning upon general propositions, without regard to any statute, or established rule, or custom, or usage, peculiar to the State, such a decision cannot be regarded as an announcement of the local law of the State. A decision based upon general

legal principles, and upon general rules of jurisprudence, can only be regarded as an announcement of what the court making the decision considers the *general* law to be.

When a case involving only general principles and general rules comes before the Federal court, whether it be one of contract or tort, the Federal court must decide it according to its own judgment, and is not bound to follow a State decision, if such decision is contrary to well settled law.

In *Hough vs. R. R. Co.*, 100 U. S., 213, 226, which was an action for negligence, this court said: "Our attention "has been called to two cases determined in the Supreme "Court of Texas, and which it is urged sustain principles "announced in the court below. After a careful considera- "tion of those cases, we are of the opinion that they do not "necessarily conflict with the conclusions we have reached. "Be this as it may, the questions before us, in the absence "of statutory regulations in the State in which the cause of "action arose, depend upon principles of general law, and "in their determination we are not required to follow the "decisions of State courts."

Why should not the same doctrine apply in an action against a city for negligence, which is applied in the case cited in an action against a railroad company?

Myrick vs. Mich. Cent. R. R. Co., 107 U. S., 102, 109, fully sustains our contention. In that case this court refused to follow the decisions of the Supreme Court of Illinois construing a contract made by a carrier for the carriage of goods, although the contract was made in that State, holding that "what constitutes a contract of carriage is not a "question of *local* law upon which the decision of a State "court must control. It is a matter of *general* law, upon "which this court will exercise its own judgment." And the cases which the court cites to sustain this proposition are *Chicago vs. Robbins*, 2 Black., 418, and *Hough vs. Railway Co.*, *ante*, both of which were cases of tort based upon

negligence, and *Railroad Co. vs. National Bank*, 102 U. S., 14, which was a case of contract.

See also Manhattan Ins. Co. vs. Broughton, 109 U. S., 126.

II.

As to the exceptions to the rulings of the Circuit Court in the admission of testimony and in the charge to the jury.

These points were so fully considered by the district judge in his opinion denying the motion for a new trial (see Rec., p. 20), that we do not feel that it is necessary to discuss them at length. We call particular attention to the opinion of the district judge.

1. As to the admission of the testimony of Bateson in regard to an accident to himself and wife at the place where the plaintiff was injured, and the precautions they took afterwards in passing over the place.

The witness testified to the defective condition of the walk, and that some two months before the plaintiff met with her accident he and his wife met with a like accident at the same place; and that afterwards, when in passing, they walked in single file. It was competent to show similar accidents occurring at the same place, not only to show the actual condition of the sidewalk, but also to show notice to the city. The point seems to be covered by the decisions of this court in *District of Columbia vs. Arms*, 107 U. S., 519.

See also

Chicago vs. Powers, 42 Ill., 169.
Pittsburg, etc., R. R. Co. vs. Ruby, 38 Ind., 294.
Quinlan vs. Utica, 74 N. Y., 603.
Dougan vs. Transportation Co., 56 N. Y., 7.
Moore vs. Burlington, 49 Ia., 136.

2. The court did not err in permitting the exhibition of the plaintiff and her condition to the jury.

The record shows that plaintiff testified as to her physical condition before the accident and subsequent thereto, and to the pain and suffering which she had experienced. She also testified that her leg, arm and face, and one side of her body had become paralyzed; and for the purpose of corroborating her testimony, the court permitted Dr. Gaylord, who was present, and who was subsequently sworn, to experiment before the jury by thrusting a large pin, which was first exhibited to the jury, into the plaintiff's face, arm and leg. It is no doubt competent in cases of this kind to exhibit to the jury the wounds which the injured party may have received, and the same principle would permit the experiment referred to in the testimony. See

Muhado vs. City R. R. Co., 30 N. Y., 370.
Schroeder vs. C. R. I. & P. R. Co., 47 Ia., 375.

It seems to be well settled that the court may, in accident cases, *compel* the plaintiff to submit to an examination for the purpose of determing whether the injuries complained of are feigned or real. And why is it not competent to *permit* such an examination to be made before the jury when the plaintiff voluntarily offers to submit to it? Certainly no kind of evidence could be more satisfactory to either court or jury, or better calculated to elicit the truth as to the nature or extent of the injuries complained of.

White vs. R. R. Co., 61 Wis., 536.
Shepard vs. R. R. Co., 85 Mo., 629.
Walsh vs. Sayre, 52 How. Pr., 334.
Hatfield vs. St Paul & C. R. R. Co., 33 Minn., 130, 18 Am. and Eng. R. R. Cases, 292.

3. The court did not err in allowing the testimony of the witness Moore set forth at page 44 of the Record, as to the condition of the sidewalk in the immediate vicinity of the

place where the accident happened, and between the police station and Michigan avenue.

This was competent, not only for the purpose of showing negligence on the part of the city, but also for the purpose of showing that the sidewalk generally at and near the place where the accident occurred was notoriously bad, and that the city was chargeable with notice of its condition. See opinion of the District Judge, Rec., 22.

City of Ripon vs. Bittle, 30 Wis., 614.
Weisenberg vs. Appleton, 26 Wis., 56.
Aurora vs. Hillman, 90 Ill., 61.
Cusic vs. Norwich, 40 Conn., 376.
Gude vs. Mankato, 30 Minn., 256

4. The court did not err in admitting the testimony of the witness Austin (Rec., p. 45), as to the condition of the walk after the accident.

The witness testified that after he heard of the accident he went to the spot where it occurred, and that the walk had then been repaired. (See Rec., p. 23.) This was competent, especially when taken in connection with the testimony of Robertson, defendant's witness (See Rec., pp. 54, 56), who testified that he was the janitor of the police station; that the walk was in bad condition; that he saw the plaintiff when she was carried into the station after the accident, and that immediately afterwards he went out and repaired the walk by putting down new plank and taking the old and broken plank into the cellar of the station.

III.

1. Defendant's third request (Rec., p. 60) that if the jury find that the alleged defective sidewalk was adjoining to and abutting the police station, and under the custody and control of the police commissioners of the city, and their patrolmen and agents, then the plaintiff could not recover, was properly refused.

The ground upon which this request was made is fairly stated by the District Judge, in his opinion (Rec., p. 24). It was in substance that as the police commissioners are appointed by the Governor, they are not to be regarded as the agents of the city, and the city was not liable for allowing the walks adjoining the station to become out of repair. But although the police commissioners are appointed by the Governor, nevertheless, the police officers are the servants and agents of the city, and the city is liable for their neglect.

Barnes vs. District of Columbia, 91 U. S., 540.
Carrington vs. City of St. Louis, 23 Cent. L. J., 294; 89 Mo., 208.
Rehberg vs. The Mayor, 91 N. Y., 137.
Twogood vs. The Mayor, etc , 102 N. Y., 216.
City of Toledo vs. Cone, 41 Ohio St., 148.
Townly vs. The Mayor, etc., 12 Hun., 542.
Fortin vs. Easthampton, 145 Mass., 196.
Goodfellow vs. The Mayor, 2 N. E. Rep., 462.

We refer the court to the diagram attached to and made a part of the record. The police station and grounds adjoining it are the property of the city.

This is not only so under the law, but is proved as a fact in the case by the testimony (See Rec., p. 51).

In this respect the case is a peculiarly aggravating one. The testimony shows that the place of the accident was alongside and immediately adjoining the police station,

and the walk was upon the grounds belonging to the city. The defective condition of the walk was plainly visible from the window of the station, and the officers of the police knew of its condition (Rec., pp. 48, 49, 50, 51, 54, 56).

By allowing the sidewalk to remain in such a dangerous condition, the city was guilty of maintaining a nuisance upon its own property, and ought to be held liable therefor upon this ground alone.

As is said by the District Judge in his opinion (Rec., p.25), "the walk was originally laid by the city, and it was pecu-"liarly incumbent upon the defendant to keep it in repair. "By Sec. 308 of the charter it is provided that the board "of public works, a recognized agent of the city, shall "supervise the grading, repairing and improving of *all* "streets in the city; and by Sec. 309 they shall supervise "the laying down of *all sidewalks* and crosswalks. No "exception is made of streets upon which police stations "are located, or the sidewalks opposite such stations."

But when, in addition to this, we consider that the police as well as the Board of Public Works are agents of the city, then the negligence and culpability of the city for the accident in this case is doubly clear and certain.

IV.

The court did not err in refusing to charge the jury according to defendant's fourth and fifth requests respecting plaintiff's alleged contributory negligence. (See Rec., 25.)

The question of contributory negligence was considered by the jury, and their finding is conclusive. We think the reasoning of the District Judge in his opinion (Rec., 25, 26 and 27), and the cases there cited, are conclusive upon this point.